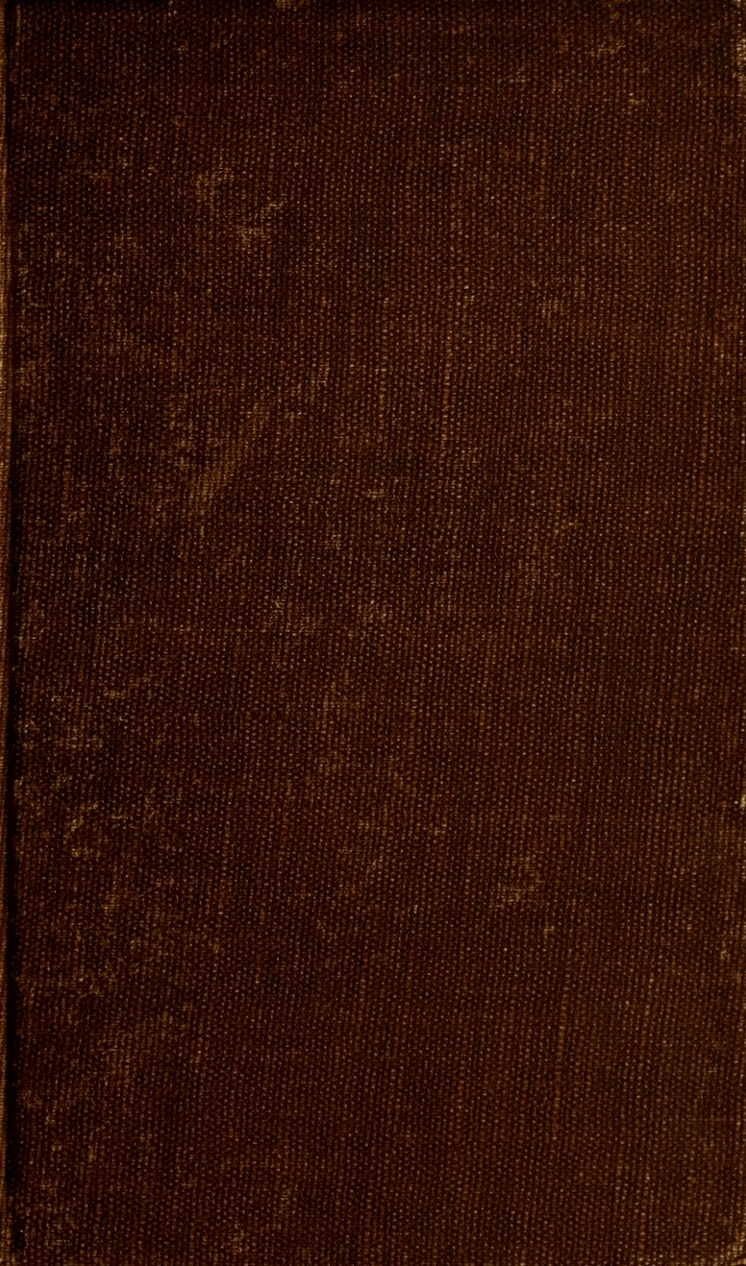




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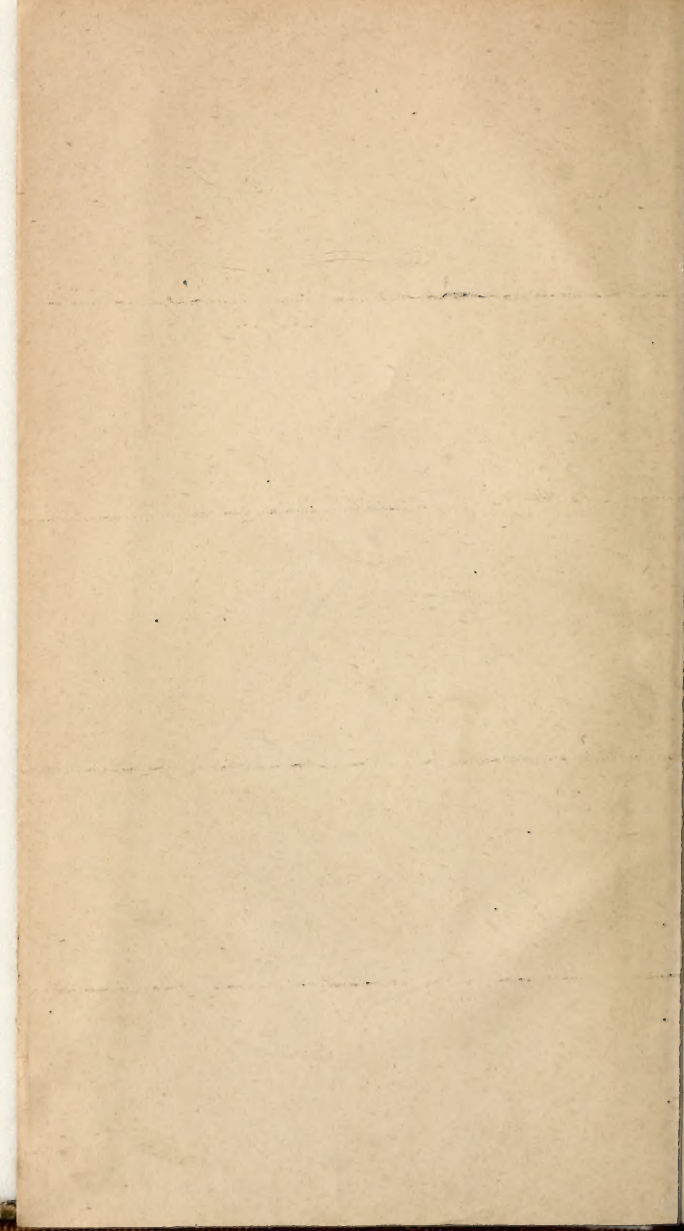
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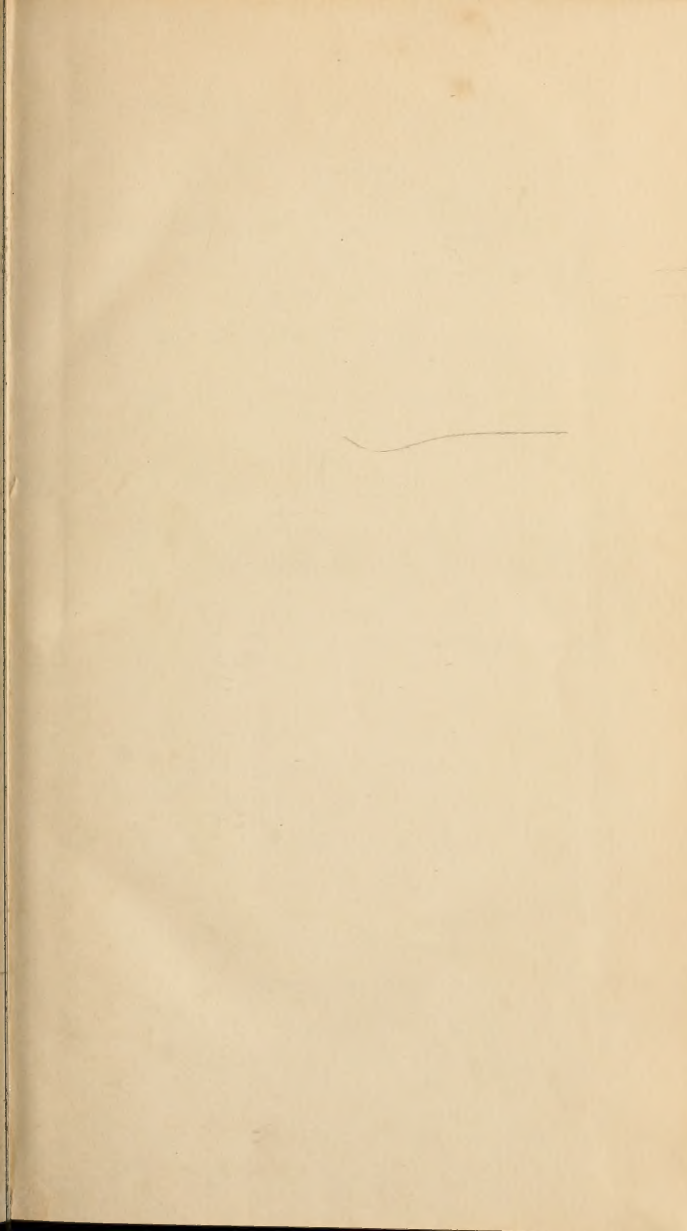
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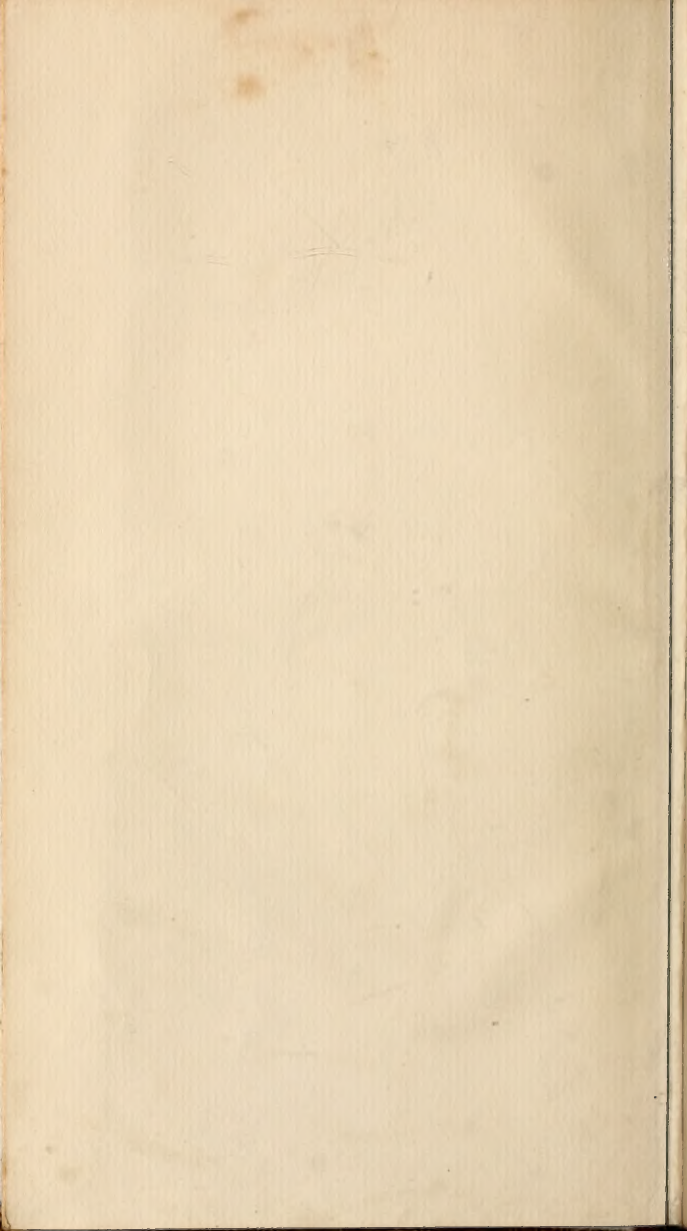


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REPORTS OF CASES

ADJUDGED IN THE

SUPERIOR COURTS OF LAW AND EQUITY

OF THE

STATE OF NORTH-CAROLINA,

FROM THE YEAR 1789, TO THE YEAR 1798.

BY JOHN HAYWOOD, ESQ.

ONE OF THE JUDGES OF THE SUPERIOR COURTS OF LAW AND EQUITY.

SECOND EDITION,

With References to subsequent enactments of the Legislature, and decisions of the Court of Conference and the Supreme Court, a Table of the Cases reported, marginal Abstracts, and a new Index.

BY WILLIAM H. BATTLE,

OF FRANKLIN COUNTY.

Raleigh :

PRINTED BY JOS. GALES & SON.

1832.

REPORTS OF CASES

REPORTED IN THE

SUPERIOR COURTS OF LAW AND EQUITY

FOR THE YEAR

STATE OF NORTH CAROLINA

FROM THE YEAR 1881, TO 1882

IN TWO VOLUMES

OF THE YEAR 1881, TO 1882

BY J. H. HARRIS

OF THE BAR AT RALEIGH, N. C.

AT THE PRESS OF J. H. HARRIS

OF RALEIGH, N. C.

1882

PRINTED BY J. H. HARRIS

1882

PREFACE TO THE SECOND EDITION.

In presenting the Public with a new edition of the first volume of HAYWOOD'S (North-Carolina) Reports, the subscriber trusts that his efforts will be received with indulgence. As that very valuable book was out of print, a bare republication of it must have been an acceptable present to the profession. But the subscriber has ventured to annex References in each case to such Legislative enactments or Judicial decisions as have been subsequently made upon the points adjudged, or the doctrines embraced, in the Reports. He has also prepared a Table of the Cases reported in the volume—affixed to each case that required it a marginal note or abstract of the points adjudged—and to the whole, has added a new Index. The subscriber is fully aware, that the Work might have been executed in a much better manner by one of greater skill in the profession, and of more ample sources of research. A limited Library has forbidden a reference to many of the English Authorities and to all the American Books of Reports. It is hoped and believed, however, that all the decisions of our own Courts have been consulted and properly referred to. The same remark is applicable to our Statutory provisions. But whatever may be the defects in the attempted improvements of the present edition, it is matter of consolation that it preserves the full value of the original work.

WILL. H. BATTLE.

Franklin County, June, 1832.

243434

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HAYWOOD'S REPORTS.

HALIFAX, OCTOBER TERM, 1789.

Arrington v. Arrington.

In a gift of personal chattels, a symbolical delivery is sufficient.

ACTION of Detinue, for a negro boy given to the Plaintiff by his uncle Sandifer. The boy being in Virginia at the time of the gift, and no delivery made, except of a dollar instead of the boy: the Court ruled, that delivery of possession in such cases, is principally in order to identify the property, and that it might also answer the purposes of notoriety; but when the identity of them could be proven, the gift was good without delivery: a verdict for the Plaintiff accordingly. And as well as I recollect, per SPENCER, if there had been two boys of the same name, a delivery might have been necessary, but as there was only one, the proof of identity was easy.

NOTE.—*Quere de hoc.* Actual delivery is necessary, not for identity, but to obviate the objection of *nudum pactum*. A gift accompanied with a delivery of possession, is a contract executed; but if there be no actual delivery, the contract, if gift, would be executory, and could not be enforced without a sufficient consideration. Vide 2 *Black. Com.* 441. *Bullock v. Timen & wife*, 2 *Car. Law Rep.* 271. *Picot, adm'r of Legget v. Sanderson*, 1 *Dev. Rep.* 309. The only case which seems *contra*, is in *Brookes's Abridg. Trespass*, 303, cited in *Picot v. Sanderson*; but that case turned upon the question whether Trover or Trespass could be maintained upon a general property without actual possession; and it may be presumed, that the word "gives" was used without considering its confined and technical meaning. 2 *Sand.* 47 a. In the case of *Lavender v. Pritchard's adm'r* the delivery of a few ears of corn, was held a good delivery of all the donor's corn, though but a small quantity of it was present. 2 *Hay.* 337.

Oct. 1790.

HALIFAX OCTOBER TERM, 1790.

Baker v. Long.

Where there is judgment and execution against the ancestor in his lifetime, no *sci. fa.* is necessary against heirs or devisees.—The demurring of the parol does not hold in this State.

- (1) The lands were devised after payment of debts to the Plaintiff, and there was judgment against the ancestor in his lifetime. It was adjudged no *sci. fa.* was necessary in order to affect the lands in the hands of the heir or devisee after the death of the ancestor or deviser, because the lands never descended; and if they had, it was *cum onere* of the judgment, and the *sci. fa.* is only necessary where a new party is to be charged; but in this case, execution was taken out in the lifetime of the ancestor, and the Court said, that attached upon the land and went with it to whoever it came. Also, per WILLIAMS & SPENCER, the demurring of the parol had its origin in feudal principles, and does not apply here.

NOTE.—The statute of 5th Geo. 2, c. 7, makes lands in this State liable to the *sci. fa.* execution, and the case of *Bragner v. Langmead*, 7 T. R. 20, shews, that if a Defendant dies after the commencement of a term, a judgment obtained on any day of that term, will relate back to the first moment of the term, and an execution may issue upon the judgment, and be levied upon the property of the deceased without making his representatives parties: *a fortiori*, a judgment and execution before the death, will be proper without a *sci. fa.* to the representatives.—Vide *Den on dem. of Baker v. Webb*, post 43. *Bell v. Hill*, post 72. *Jones & others v. Edmonds*, 3 Murphey 43.

State v. Ransome.

Per WILLIAMS, Justice. A man may as well be indicted on an affidavit not signed, as if it was signed. The signing is only for the sake of evidence, to prevent one man being mistaken for another, and it shews also that it was done with deliberation.

(2)

Farrel v. Perry.

If a father, at the time of the daughter's marriage, puts a negro or other chattel into the possession of the son-in-law, it is *prima facie* a gift. Interest in the event of the question, but not of the cause, will not exclude a witness.

Per WILLIAMS, who delivered the opinion of the Court. If a father at the time of his daughter's marriage, puts a negro or other chattel into the possession of the son-in-law, it is in law a gift, unless the contrary can be proven. For otherwise, creditors might be drawn in by false appearances. In this case, it was ruled *per curiam*, that a man interested in the event of the question on which the Defendant's title hangs, though not in the

event of the cause, must be admitted as a witness, *contra* Reeves and Symonds, and the cases there cited; and said, if we begin to exclude from testimony for bias, we shall be without a rudder or a polar star to direct us—for friendship, resentment, religious opinions, sense of honour in different men, &c. are to be considered, in order to find out the bias which will probably be in each witness, and of these the Court cannot know any thing in most instances. It is best to adhere to the ancient rule that interest shall alone exclude. (2)

NOTE—As to the first point, vide *Carter's ex'rs v. Rutland*, post 97. *Parker & wife v. Philips*, post 451. The act of 1784 (*Rev. c. 225, s. 7*) makes void parol gifts of slaves; but in construing the act, the Courts have uniformly decided, that such a gift is good between the parties, and void only as against creditors and purchasers. *Knight & wife v. Thomas*, post 289. *Pearson v. Fisher*, 1 *Cor. L. Rep.* 460. *Sherman v. Russel* ib. 467. *M'Ree v. Houston*, 3 *Murphey* 429. *Watford v. Pitt* ib. 468. (In the two last cases the purchasers had notice of the gift). *Lynch's ex'r v. Ashe*, 1 *Hawks* 338. The act of 1806 (*Rev. c. 701, s. 1*) provides that no parol gift of slaves shall be good in any case; accordingly it has been held, that a written transfer is necessary in all cases, even as between the parties. *Cotten v. Powell*, 2 *Cor. L. Rep.* 432. *Barrow v. Pender*, 3 *Murph.* 483. The third section of the act of 1806, requires those claiming title under parol gifts, to bring their actions within three years, &c. which was decided to bar the legal remedy, but to give no title to the possessor. *Skinner v. Skinner*, 3 *Murph.* 535. *Lynch's ex'r v. Ashe*, 1 *Hawks* 338. But this is altered by the act of 1820 (*Rev. c. 1055*). The third section just referred to, provides that children in possession of slaves at the death of their parent under a parol gift, may either retain them as an advancement, or may bring them into hotchpot and claim a distributive share. And the proviso extends to cases thereafter to be made, as well as to those theretofore made. *Bull's adm'r v. Brooks*, 3 *Murph.* 133. *Stallings v. Stallings*, 1 *Dev. Eq. Rep.* 298.—A reservation of a life-estate in a gift of slaves is void, but if before the act of 1806, such a reservation had been made in a parol gift, and the donor had continued in possession until his death, which was more than three years from the time of the gift, yet the donee would not be barred, as the donor might be considered as holding under his title. *Vass & wife & others v. Hicks*, 3 *Murph.* 493.—Since 1806, if a parent puts a slave into the possession of a child, without an express parol gift, this possession is not adverse, and will not divest the title of the parent, or bar his action. But dictum by HALL, Judge, that an express parol gift might be ripened into an indefeasible title by a possession of three years. *Justice v. Cobbs & Jeter*, 1 *Dev. Rep.* 493. This dictum of Judge Hall is overruled by the case of *Palmer v. Faucet*, 2 *Dev. Rep.* 240.

As to the second point decided in this case, vide *Madox v. Hopkins*, post 4, *contra*. *Porter v. M'Clure*, post 360. *Harrison v. Harrison*, 2 *Hay.* 355, &c. Vide also *Philips on Evidence*, vol. 1, 38. *Bul. N. P.* 283, and the cases referred to in each of those treatises, which fully support the decision in *Farrel v. Perry*.

Montfort's Ex'rs. v. Alston.

Bond for Virginia money. *Per curiam*. When Virginia money is contracted for in this State, payable here, it must be determined according to the rates established

Mar. 1791 by law, not according to the exchange; otherwise, were it contracted in a foreign country and there payable. But if in State contracts, the exchange at Halifax for instance shall be the measure, when it is different at Edenton, and still more so at other places, this would be a strange mode of administering justice.

(2)

MORGANTON, MARCH TERM, 1791.

ANONYMOUS.

Henderson moved against the Sheriff for not returning the execution; and among other things it appeared, the Sheriff had bought part of the property himself. And per *SPENCER*, the sale is not lawful and the Sheriff ought to be punished. This opinion was said to be grounded on a decision that had taken place at Salisbury some time before.

NOTE.—Vide *Ormond v. Faircloth*, *Con. Rep.* 550. 1 *Murph.* 35. It is a general rule, that all persons who stand in the character of trustees for the benefit of others, are prohibited from purchasing at their own sale. Vide Judge *HENDERSON*'s opinion in *Gordon v. Finley*, 3 *Hawks* 239.

HILLSBOROUGH, APRIL TERM, 1791.

(3)

State v. Coulter.

A person entitled to a reward, offered by the General Assembly, on the conviction of an offender, is a competent witness against such offender.

Indictment for horse-stealing.—The General Assembly, at their last session, had offered a reward to any person who would apprehend him, to be paid upon conviction. Stokes apprehended him for stealing his horse; and now upon trial of the indictment for stealing this horse, Stokes was offered as a witness on the part of the State; and though it was strongly objected that he ought not to be received, as it depended upon Coulter's conviction whether he should be entitled to the reward promised by the General Assembly, and that he could not be entitled to it unless Coulter should be convicted. Yet per curiam, consisting of *SPENCER & MACAY*, he is a competent witness, and must be received: and he was received and gave evidence accordingly, and upon his evidence Coulter was convicted, and received judgment

of death, and was executed. Vide 2 *H. H. P. C.* 304, Sep. 1791. 280, 281.

NOTE.—Vide *Heward v. Shipley*, 4 *East's Rep.* 178.

MORGANTON, SEPTEMBER TERM, 1791.

Swann v. Gauge.

Note given to a married woman who lived separate; (3) the husband never assented to the contract, and the debt was attached as due to him.—Per WILLIAMS, the only Judge in Court, assent of the husband is not necessary, the debt becomes his immediately upon delivery to the feme.

NOTE.—In such case, the husband might sue alone, or join his wife with him, which shews that the debt is due to him. 1 *Chit. Plead.* 19.—The husband's assent would be presumed, until the contrary was shewn.

Greenlee, assignee v. Young, assignor.

An assignee, two years after the assignment, sues the drawer, and takes him in execution by *ca. sa.* from which he is discharged by an insolvent act. Recourse to the assignor is gone by the delay. (*Quere*, whether one year would not be too long?) also by the *ca. sa.* and discharge therefrom.—A witness may be introduced to shew the consideration of an assignment.

Assignee brought an action against the drawer, having waited two years after the assignment, obtained judgment, and took the drawer in execution by *ca. sa.* Per *curiam*, he has forfeited his recurrence to the assignor by so long delay; certainly a year ought to be considered the longest time to be allowed. Credit in this country is never given for a longer time, and indeed it is much to be doubted if that is not too long. 2dly. He has taken the drawer in execution by *ca. sa.* who hath discharged himself of the debt by the insolvent act. Now suppose the present Plaintiff should recover against the assignor, and he should sue the drawer, the drawer will plead his former discharge, and it will be good. So by this means you will subject the assignor, and yet leave him without remedy, which is not law. 3dly. It was adjudged in this case, that a witness might be introduced to explain the condition of the assignment.

NOTE.—The cases of *Brown, Campbell & Co. v. the adm'rs of Craig and Cleary*, and *Alston v. Taylor*, post 378 & 381, seem to establish the position, that a person who receives unnegotiable paper, is not bound to the same diligence as if he had taken a negotiable instrument under an endorsement, and that he shall not be liable to any loss, unless under all the circumstances of the case, he be deemed to have neglected to use reasonable diligence in the collection of the claims.—With regard to negotiable instruments, our Courts have seemed at

Sep. 1791. some loss in establishing the *reasonable time* within which an endorsee must give notice to his endorser in order to charge him. WILLIAMS, Judge, in the first case above referred to, says, "it has been determined in our Courts, that a year shall be the longest time allowed for the giving this notice." In the case of *Gardiner v. Jones*, 2 *Murph.* 429, DANIEL, Judge, says, "In this State no fixed rule has been established, within what time notice of a demand and non-payment should be given." But in that case, fifteen months were held to be too long. Subsequent cases have shewn a disposition in the Courts to adopt the strictness of the English law, at least in banking and mercantile transactions. In the *State Bank v. Smith*, 3 *Murph.* 70, where a note fell due on the 11th, and notice was not given to the endorser who lived in the same town, until the 17th of the same month, the endorser was held to be discharged by the delay. It was said by the Court, that even if they should allow three days of grace, yet notice should have been given on the 15th, and the delay till the 17th was too long. In *Brittain ex'r of Brown v. Johnston*, 1 *Dev.* R. 293 The Court (after an *advisaria*) say, that "where the parties all reside in the same town, and are engaged in mercantile pursuits, or have transactions with a bank," the Court "have considered themselves warranted in requiring the utmost diligence in such circumstances." But the same case decides, that among farmers resident in the country, less strictness is required, and that ten or twelve days delay was not too long. *Yancy v. Littlejohn*, 2 *Hawks* 525, holds, that where the parties all resided in the same village, four months delay would discharge the endorser. The correct principle deducible from a view of all the cases seems to be, that the question of reasonable diligence (which is to be determined by the jury, under the directions of the Court) must be ascertained by a consideration of the pursuits and residence of the parties respectively. *Brown's ex'r v. Johnston*, 1 *Dev.* 293. That a witness may be introduced to explain the condition of an assignment, is established by the case of *Wright v. Latham*, 3 *Murph.* 298, in which it was decided by HALL & HENDERSON, Judges, against TAYLOR, Chief-Justice, that parol testimony was admissible to prove a contract variant from what the law implies upon a common endorsement.

M'Kinnie's ex'rs v. Oliphant's ex'rs.

Per WILLIAMS, the only Judge in Court, trover, trespass, deceit, or any other action of the like nature, will lie against executors, where the thing itself has been used so as to go into and increase the testator's estate, so that the benefit thereof comes to the possession of the executor, otherwise where the thing is destroyed, as if a man take my bullock and eat him. The case of *Hambly & Trott*, in *Cowper*, is not law; and further, I never knew a case in *Cowper* to be received as law in our Courts.

NOTE.—Vide *Decraw v. Mone's ex'rs*, post 21. *Clark v. Hill*, post 308. *Avery v. Moore's ex'rs*, post 362. In the last case cited, the article of property for which the action was brought, did not go into and increase the estate of the testator; but it was decided that that made no difference. The Editor has it from good authority, that the expression attributed to Judge WILLIAMS in this case, that he "never knew a case in *Cowper* to be received as law in our Courts," is a mistake, and was never used by him.

Blanton v. Miller. Ejectment.

Sep. 1791.

Ruled per WILLIAMS, that the Court have never departed from this rule—where the party hath lost his deed, or is out of possession thereof, he himself, and no other person for him, must make oath of the loss, before he shall be permitted to read a copy, because no other can safely swear of his want of possession: and so the Plaintiff was called, though it was urged to the Court he was in a foreign country. (4)

NOTE.—Vide *Wright & wife v. Bogan*, in note post 178. *Park v. Cochran & others*, post 410. *Nicholson v. Hiliard*, 1 Car. Law Rep. 255.

SALISBURY, SEPTEMBER TERM, 1791.

State v. Mann.

Per WILLIAMS, the meaning of the word *command*, as applied to the case of principal and accessory, is where a person having control over another, as a master over his servant, orders a thing to be done.

Madox v. Hoskins.

The Defendant had purchased a negro of Ward, who pretended a title under the Plaintiff, and called a man who also had purchased one other negro of Ward, who claimed it in the same manner—objected, he is interested in the question. To this it was answered, that the case of *Farrel & Perry*, in Halifax, October, 1790, had settled this point, and had determined that the objection must be as to his interest in the event of the cause. But per WILLIAMS & MACAY, Judges, where a man is plainly interested in the event of a question, he hath been excluded by all authorities. And per WILLIAMS, I remember something of that case at Halifax, but the circumstances must have been different from this.

NOTE.—Overruled, vide the references in the note to *Farrel v. Perry*, ante 2.

HILLSBOROUGH, OCTOBER TERM, 1791.

State v. John G. Blount & Thomas Blount.

Whenever one person has the money of another, and knows what sum he ought to pay, he must pay interest for the same.

They had received of the State at different times for the purpose of discharging the debt due from this State to the Government of Martinique, by commodities to be purchased and shipped, the sum of thirteen hundred

Oct. 1791. pounds—eleven hundred pounds they laid out accordingly, the rest they never applied; and the question now was, whether interest should be allowed. *Mr. Moore* urged it was to be considered in the nature of a loan, and insisted that in all cases where a man retains another's money, the amount whereof he knows, interest ought to be allowed, and cited 3 *Wils.* 205. 2 *Re. Re.* 761. 1 *Bur.* 151. 2 *Bur.* 1085. *Doug.* 724. And *per curiam*, Wherever the party knows what sum he ought to pay, there he ought to pay interest: here they well knew how much of the money they had appropriated to the purposes they received it for, and for the balance they ought to pay interest; and it was allowed by the jury accordingly by way of damages.

{ 5)

☞ This case may have been decided in April, 1792, the original note has no date to it.

NOTE.—Vide *Hunt v. Jacks* and *London surviving partners, &c.* post 173. The English authorities upon the subject of interest, are very much at variance with each other: (Note to *De Haviland v. Bowerbank*, 1 *Camp. N. P. Rep.* 52) and the later decisions appear to be incompatible with our notions of justice. Vide *Com. on Con.* 2d vol. p. 178-9 of the 3d Amer. ed. The most proper rule seems to be, that laid down in *Hunt v. Jacks* and *London surv. partners, &c.* "That wherever the debtor knows precisely what he is to pay, and when he is to pay it, the jury may give interest by way of damages."

Strudwick v. Shaw.

In 1728 the land in dispute was granted to A, who in 1730 conveyed to B, who soon afterwards went to England. B sold to C, who in came to this country, but soon went back again. In C returned to Carolina, where he remained, and in 1787 brought suit. One D settled on the lands in question in 1751, lived upon them thirteen years, and died in possession, leaving a son. The son assigned to some person, who assigned to the D-fendant, who had lately procured a grant. Under these circumstances, it was held, that the Plaintiff's *jus possessionis* was lost.

In the year 1728, the premises in question were granted to one Foster; in 1730, Foster conveyed to Governor Burrington, who soon afterwards went to England. In the year Burrington sold and conveyed to Strudwick, by a general description of all his lands in North-Carolina. Strudwick came to this country in the year but soon went to England again, and in the year returned to Carolina, where he remained, and in 1787 brought suit.—One Hopkins settled on the lands in question in 1751, and lived upon them 13 years, when he died in possession, leaving a son. This right of possession was afterwards assigned by him to some person, who assigned it to the Defendant, who, under this right, had lately procured a grant from the State.

The argument of *Davie* for the Defendant—The Plain-^{Oct. 1791.}
tiff has shewn a title as his Counsel alleges, to the pre-
mises mentioned in the declaration, and the location be-
ing settled by former determinations, shall not be brought
into question at present: but there are several material
objections against the Plaintiff's recovery.

1st. It does not appear that there has been any actual
possession in the lessor of the Plaintiff, or the persons
under whom he claims since the year 1728; therefore, if
the Plaintiff ever had a right to recover in an action of
ejectment, that right has been lost by his laches.

The nature of the title to lands is such, as to make it
divisible into three distinct species of property, or kinds
of right. It may consist of the *naked possession* or a *right*
of possession, or a *mere right of property*. The first may
happen, where a person in this country should enter
upon a woodland, though granted estate, and settle and
cultivate it, and thus actually occupy, without the sha-
dow of right or colour of title, as it is called in our
Courts. The second will take place, where the patentee
submits to the unsanctioned occupation of the settler,
who has the actual possession, while the right of posses-
sion resides in the person to whom the land was granted.
The third species of property will be found, where the
grantee may have "the true ultimate property of the
lands in himself, but by the intervention of certain cir-
cumstances, either by his own negligence, the solemn
act of his ancestor, or the determination of a Court of
justice; the presumptive evidence of that right is strong-
ly in favor of his antagonist, who has thereby obtained
an absolute *right of possession*." 2 *Bl. Com.* 195, 196, 197.
Co. Lit. 345, 385. *Gilb. Ten.* 18.

Ejectment being a possessory action, it lies only where
the lessor of the Plaintiff could rightfully enter, and the
title to support a recovery must therefore be inseparably
connected with the right of possession, and must have
this ingredient at least. The title of the Defendant is
entirely out of view. It is an old maxim that a man
must recover by the strength of his own title in eject-
ment, not in consequence of any weakness in that of his
adversary. Every Plaintiff in ejectment, says Lord
MANSFIELD, in the case of *Atkins v. Horde*, must shew a
right of possession, as well as a right of property; there-
fore, the Defendant need not plead the statute, and the

Oct. 1791. Plaintiff must shew that his lessor had a right to enter : and this can only be effected by proving a possession within seven years in the Plaintiff, his ancestors, or the persons under whom he claims, and such possession must be an actual possession. 1 Burr. 119. Runn. 112, 113.

By the statute of 21 Jac. 1 ch. 16. "None shall make an entry into land, but within twenty years after their right or title shall first descend or accrue." Our own act of limitations only alters the phraseology to "shall thereunto enter or make claim," and shortens the limitation to seven years: so that the English decisions may be considered authorities as to the operation of this part of the statute; and it will appear by all these, as well as the opinions of every writer on the subject, that where there hath been no possession during the time limited in the statute, either in the lessor, his ancestors, or the persons under whom he claims, the Plaintiff in this action will be nonsuited, unless his case may be brought within some of the exceptions allowed by the act of Assembly. The action of ejectment is only competent where the Plaintiff may enter; and the right of entry is, in this case, completely taken away, by the statute, and the claimant, by such default, utterly excluded and disabled from any entry, or claim to be made, after the seven years are expired. This is not only the plain letter of the law, but the construction has been uniform. Runn. 14 to 17. Salk. 205. 5 Bur. 2635. 6 Mod. 44. Cas. K. B. 573. 2 Keble 127. 1 Bur. 119.

Thus the neglect of the Plaintiff, in this case, to enter, or make claim, as I take it, has wrought an actual bar; not by the Defendant acquiring title, but by his losing or destroying his own right of action; and to the authorities already adduced, may be added the case in *Strange* 1142, and the law as stated in 2 *Black.* 196, 197, 198. The law presumes that the tenant in possession, either had at first, a good title, in consequence of which he entered on the lands in question, or that since his entry he had acquired one; and therefore, after so long an acquiescence, his possession shall not be disturbed, without enquiring into the absolute and real right of the property, unconnected with the right of possession.

He said that the legal notions of possession in this country have been extremely vague and indefinite, but he did not recollect any case in which this doctrine had been settled with due precision. The constructive pos-

session, mentioned in some cases by our Judges, is a doctrine unknown to the common law ; but he held that the correct idea of that possession, which would arrest the operation of this act, is such a possession as is described by *Coke Inst.* 15. *Quasi pedis positio*.—That the claim must be made by suit in law under the express terms of the 2d sec. of the act, and that the entry must be an actual entry, and the possession an actual possession. *Bul.* 102, 103. 1 *Salk.* 285. Oct. 1791.

Independent of the operation of the 2d sec. of our act of limitation, by the determinations in England, received as authority here, seven years adverse possession is not only a negative bar to the action, or remedy of the Plaintiff, but a positive title to the Defendant ; and therefore, where A had the possession of lands for twenty years in England, without interruption, and then B got into possession, on which A was put to his ejectment : here, though A was Plaintiff, yet his possession for twenty years was deemed a good title, and he recovered accordingly. This was ruled by *HOLT*, Chief Justice, saying that a possession for twenty years, was like a descent, which tolls an entry, and gives a right of possession, which is sufficient to maintain an ejectment. *Salk.* 421.

(8)

In the present case there has been an actual uninterrupted and adverse possession for thirty-six years by the Defendant, and those under whom he claims, whereby he has acquired a title, upon the strength of which he could recover in this form of action against the Plaintiff himself, who has now nothing left but the mere right of property.

The Court will also please to observe, that this objection, under the form of the title acquired by the Defendant from possession, collects additional force from a comparison of the statute of *James* with the act of North-Carolina. The 3d sec. of our act is an abstract from the 1st sec. of the English statute, and operates on the right or title of the person who is out of possession, without appearing to touch in any manner whatsoever, the right or title of the tenant in possession.

The 2d sec. of our law enacts, “ that all possessions of, or titles to any lands, tenements or hereditaments whatever, derived from any sales made either by creditors, executors or administrators of any persons deceased, or by husbands and their wives, or husbands in right

Oct. 1791. of their wives, or by indorsement of patents, or otherwise, of which the purchaser or possessor, or any claiming under them, have continued, or shall continue in possession of the same for the space of seven years, without any suit in law, be, and are hereby ratified, confirmed, and declared good and legal, to all intents and purposes whatsoever, against all and all manner of persons: any former or other title, or claim, act, law, usage or statute to the contrary, in any wise, notwithstanding." In the whole of the statute of *James*, there is nothing like this section, yet the adjudications in this country have always followed the construction of that statute, and have generally fallen short of them, without noticing the extensive and beneficial operation of this clause.

It will be remarked, that this clause relates only to the right of the tenant in possession, operating in such a manner as to ripen an inchoate or defective right into a complete title.

(9) That the act embraces "all possessions of lands," as well as "titles to lands," derived from any sales made to creditors, &c. or by indorsement of the patents, or otherwise. Thus every "sale," whether of the possession, or right of occupancy, or the title comes within the purview of this clause, which goes to the absolute confirmation of the title of the purchaser.

The act appears to have embraced expressly both the cases of a mere *right of occupancy*, and what is usually called a *title*, by the expressions of "all possessions of," or "titles to," "which the purchaser or possessor:" So that sales of the right of occupancy, a very common case in this country, ever since its first settlement, are clearly within the letter and policy of the act. The sale and assignment of the possession by the heir of Hopkins, connected with a continued possession, a possession that has not been interrupted by any suit at law, we contend has now ripened into a complete title, absolutely ratified and confirmed by this act to the Defendant, any former or other titles notwithstanding.

It is not necessary to enquire in this case, whether the Defendant has acquired a title under the 2d sec. of this act, that would resist a writ of right: the Court, however, would permit him to observe, that if this act contained no more than the statute of *James*, there could have been no question as to this point; but our law has a much higher regard for possession, and connecting it

with the circumstance of time, makes it the strongest evidence of title; and it is from the full and strong expressions of this clause of the act, that he had held, a title like this could not be disturbed by a writ of right in this country. Oct. 1791.

The statute of limitations, as far as it respects real estates, is a law of the utmost importance to the peace and happiness of the community. The leading motive of entering into society, was the protection of property, and the great object of the law is, to secure and quiet men in the possession of it: this policy is strongly expressed in the preamble of the act, "Whereas great suit, debate, and controversy hath heretofore been, and may hereafter arise, by means of ancient titles to land derived from patents granted by the Governor of Virginia, the conditions of which patents have not been performed, nor the quit-rents paid, or the lands have been deserted by the first patentees, or for, or by reason, or means of former entries or patents granted in this Government; for prevention whereof, and for quieting men's estates, and for avoiding suits in law, Be it enacted," &c.

The case under the consideration of the Court, is precisely one of the cases contemplated by the act. Where patentees have deserted their lands still a wilderness, and others, ignorant of such appropriation, have settled upon them, and improved them by the labor of many years, expecting to acquire a title in the course of time, on the usual terms from Lord Granville or the King; it would be incompatible with the principles of justice, or the policy of an infant Government, struggling with the difficulties of settlement and a feeble population, to turn the improving tenant out of possession. (10)

He said he relied with confidence upon these objections arising out of the statute, supported by an uniform train of decisions, and no determination in this country could be said to have shaken these authorities, unless the case of *Mallett and Minns* in this Court, should be considered as militating in some measure against the construction contended for on the first point. In that case, two points were determined, 1st. That the delivery of the grant to the grantee, should raise a constructive possession, sufficient in law to preserve the grantee's right of entry where there is not an adverse possession. 2d. That the Plaintiff shall be put to prove an actual possession in himself within seven years, only where the De-

Oct. 1791. fendant sets up an adverse possession for that time. In this case, there has been an actual adverse possession ever since the year 1751; and for more than seven years by the Defendant himself; so that this new doctrine of constructive possession, which owes its birth to this case of *Mallett and Minns*, will not serve the Plaintiff in this instance.

It may perhaps be said, that the absence of Burrington beyond sea, as well as that of the lessor of the Plaintiff, and the time struck out on account of the intervention of the war, will bring this case within the exception of the act of Assembly.

To this he answered, that the proviso of the act of Assembly saves the right of action to persons beyond seas, only for eight years after their title shall accrue, the words of the act being, "or persons beyond seas, within eight years after the title or claim becomes due, shall take benefit and sue for the same." So that it becomes necessary to bring suit within eight years after the adverse possession took place, even upon the doctrine delivered in the case of *Mallett and Minns*. It is also to be observed, that Mr. Strudwick came to this country in the year , after the sale of Burrington to him, and that the act certainly attached upon his right at that time, and his returning to England would not prevent the statute running; so that after striking out the ten years from March '73 to '83, there is sufficient time for the statute to have complete effect; and when the act begins to run, it cannot be suspended on account of any after defect or impediment whatsoever. To prove this point, he cited *Plowd.* 368 to 376, saying that indeed this was the case of a fine, but that the reason and principle was the same in a common case under this act; and that the determination upon the statute of limitations had ever since followed the decision in the case of *Stowell v. Lord Zouch*. See 2 *Will.* 582 3. 1 *Will.* 134. *Stra.* 556.

There is one other point of great importance, which has not yet been sanctioned in this country by any direct decision. He said, I admit the doctrine has been questioned, but there is no part of the common law more clearly settled than that, when a descent is cast, the heir of the disseisor has the *jus possessionis*, because the disseisee cannot enter upon his possession, and evict him, but is put to his real action, because the freehold is cast by the law upon the heir. Howell was thirteen

years in possession, died in actual possession, and the law cast the freehold upon his son; and the reason of the law as stated in 2d *Black.* 177, applies to this country as strongly as any other. The law, says he, will presume that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be judicially shewn; and therefore, the heir shall not be evicted by a mere entry, although such a measure would have been competent in law to have dispossessed the ancestor. The alteration by the statute of the 32d *Henry* 8th, of this common law rule, only requires that the disseisor should have five years peaceable possession next after the disseisin, and a descent cast under these circumstances tolls an entry, unless the disseisee should have made continual claim. He therefore concluded, that there being a descent cast in this case, the right of entry of the lessor was also thereby taken away, and that therefore, the Plaintiff could not recover in this action; and relied as to this point, upon *Inst.* 250, 225. Sec. 426. *Gilb. Ten.* from 21 to 36.

Mr. Moore, in reply, cited *Burr. Rep.* 60, to shew the doctrine of seisin and disseisin, and to prove there could be no disseisin in this country. The Court, consisting of Judges WILLIAMS and MACAY, after advising together on the bench for some time, said that the *jus possessionis* was lost by the Plaintiff; and without giving their opinions at large, directed the Plaintiff to be called: and accordingly he was called, and nonsuited.

NOTE.—The Court gave no reasons for their decision in this case, so that we know not with absolute certainty upon what grounds their opinion was formed. Whether the Plaintiff lost his right of possession by laches, or by the descent cast: Whether the possession of the Defendant and those under whom he claimed, operated only to bar the Plaintiff's remedy, or likewise to perfect his own title, are matters left for conjecture. A reference to subsequent cases may perhaps point out to us the principles upon which it should have been decided. If the descent cast was relied upon by the Court, I know of no decision in this State, either affirming or overruling it, and it would be presumptuous in me to venture to predict what would be the decision of our Judges upon a case in which that point should arise. The question might occur in the case of a person who had obtained, and continued in possession of lands for five years, either with or without colour of title, and then should die in possession leaving heirs; with the additional circumstance, in case where he had colour of title, that his death should be before the expiration of seven years. Where the possessor had no colour of title, I presume, according to the present notion of such a possession in this State, his heir would acquire no greater right than he had; but if the possession was accompanied with colour of title, it would be for our Courts

Oct. 1791. to say whether the English law was founded upon doctrines which do not suit the circumstances of this country, or whether it is not equally politic *here* to protect at least the possessory right of an heir claiming under such descent. If the Court, in this case, were influenced by the length of the Defendant's possession, which, with that of those under whom he claimed, was said in argument to be thirty-six years, we shall find that later decisions have put a different construction on the statute of limitations. It will be remarked, that the Defendant's possession in this case, was a naked one without colour of title. In the case of *Young v. Irwin*, 2 Hay. 9, it was said by HAYWOOD, Judge, that the Plaintiff need not have been in actual possession within seven years: that his title by deed or grant gives him a constructive possession, which preserves his right of entry, until it be destroyed by an actual adverse possession, continued for seven years under colour of title. *Slade v. Smith*, post 248, decides, that when a man has obtained a grant of land, he has a constructive possession until an actual adverse possession commences, which adverse possession must be a continued one for seven years before the *jus intransit* of the grantee is lost. And the case of *Borretts v. Turner*, 2 Hay. 97, and of *Stanly v. Turner*, Con. Rep. 533. S. C. 1 Murph. 14. shows, that the adverse possession must be under colour of title. *Vide* the observations of HAYWOOD, Judge, upon the case of *Armour v. White*, 2 Hay. 87 inserted likewise in a note to *Stanly v. Turner*, 1 Mur. 14. As to what is a sufficient possession under the act, *vide Andrews v. Mulford*, post 311. *Grant v. Winbourne*, 2 Hay. 56. *Anon. ib.* 76. As to colour of title, *vide* — *v. Ashe*, 2 Hay. 103. *Pearce v. Owens*, *ibid* 235. *Evans v. Satterfield*, 1 Mur. 413. *Hill's heirs v. Wilton's heirs*, 2 Mur. 14. *Trustees of University v. Blount*, N. C. Term Rep. 13. *Jones v. Putney*, 3 Mur. 562. *Tate v. Southard*, 1 Hawks 45. *Campbell v. M'Arthur*, 2 Hawks 33. *Episcopal Church of Newbern v. Newbern Academy*, *ibid* 233. *Rayner & wife v. Capehart*, *ib.* 375. *Tate's heirs v. Southard*, 3 Hawks 119.

— HAYWOOD'S REPORTS —

HALIFAX, OCTOBER TERM, 1791.

(12)

Merrit v. Warmouth.

Definive. Warmouth had hired the negro in question of Waller; and the negro had been demanded while in his possession; but before the issuing of the writ he delivered the negro to Waller, so that the negro was not in the Defendant's possession at the time of the action brought. Per ASHE and SPENCER, yet a recovery may be had against him, and ruled accordingly, and Plaintiff had judgment.

Cobbs v. Fowler.

Ruled per ASHE and SPENCER, that as in this case there were five Defendants in trespass, and four had been taken and pleaded to issue, and the process had not continued against the other for several terms, it was a dis-

continuance of the whole cause. *Davie* for the discontinuance, cited 11 Co. 6, where it is said, there was trespass against four, and judgment by default against one, and a writ of enquiry awarded to prevent a discontinuance. In the present case, a discontinuance was entered accordingly, though much opposed by the Counsel on the other side. Mar. 1792.

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MORGANTON, MARCH TERM, 1792.

Witherspoon v. Isbell.

The words were laid in the declaration to have been spoken in some month of the year 1788, and the writ appeared to be dated above six months after that time, and the act of limitations was pleaded in bar; and on the evidence it appeared the words were actually spoken a considerable time after the time laid in the declaration. And per WILLIAMS, there is a difference between laying a fact after the time it really happened, and before the time it really happened: in the first case, the declaration is supportable, in the second it is not—so the Plaintiff was nonsuited. *Quere de hoc, et vide Salk. 662. Cro. J. 428. Bull. 33. L. Ev. 241. Co. Litt. 283. Cro. Car. 514, 228. 1 Sid. 308. Trials per pais, 394. Cro. J. 94. Touch. Pre. 264, 549. 5 Mo. C. 287. 1. Bac. Ab. 102. 2 H. H. P. C. 291.*

State v. Grisham.

Indictment for feloniously and burglariously breaking and entering into the dwelling-house of one Rice, and feloniously and burglariously stealing thence a twenty shilling bill, &c. the jury find him guilty of the larceny, but not guilty of the burglary. The Judge at first thought he could not be punished, but at length, seeing the authorities in *H. H. P. C. 559, 560, of the 1st Book, and 302, of the 2d Book*—where it is said, two or three several charges may be contained in an indictment of burglary, and if he be found not guilty of the burglary, but guilty of the other charges, he may be punished as if he were only indicted for them. He gave judgment that the prisoner should be branded in the hand; which was accordingly done in presence of the Court. (15)

Mar. 1792. *NOTE.*—Vide *State v. Allen & Royster*, 4 Hawks 356, in which the principle of this decision is distinctly recognized. See also, *State v. Twitty*, post 102.

State v. Joseph & Reuben White.

An indictment for trespass in taking and carrying away negroes out of the possession of one, may be sustained, although it may have been done at the command of the party who had the real title to the property.

Indictment for trespass, in taking and carrying away two negroes from and out of the possession and ownership of William Baily. After the facts were proven on the part of the State, *Mr. Avery*, on the part of the Defendants, offered to produce several witnesses, to prove that the property of these negroes was in one Samuel Scott, of South-Carolina, and that the Defendants had taken them for him and by his command: but by his Honor Judge WILLIAMS, property here is not the question—the law prescribes a method whereby Scott might have regained the possession of that property if he had a right to it—that is to say, by a civil suit. Such methods of acquiring possession as these Defendants have taken, are in violation of the rules of law, and of evil example to the public; and if such kind of evidence should be received, would render property of this kind very insecure: for great numbers of negroes have been brought hither from other States, and they may all be taken and carried away again to other States, if there should be any claimants of them there; and the honest purchaser here would be left almost without a remedy. There was a verdict for the State.

NOTE.—Vide *State v. Flowers & Hampton*, 1 Car. Law Rep. 97 — 2 Murp. 225. *State v. M^d Dowell & Gray*, 1 Hawks 449.



SALISBURY, MARCH TERM, 1791.

Billews, Adm'r. v. Patrick Bogan.

By WILLIAMS, Judge. An acknowledgment made to an executor will prevent the operation of the statute of limitations, as well as if made to the testator. ASHE, Judge, *contra*. Verdict against evidence is not sufficient for a new trial, if justice is done by it.

In this case, the debt had accrued above three years before the commencement of the action, but there was an acknowledgment of the note having been executed within

three years : and per WILLIAMS, on a motion for a new trial, that is sufficient to prevent the bar by the statute, as well in the case of an executor as of the party himself who made the contract. He relied upon *Salk*. 29. *Pl.* 19. Adopted by 3 *Bac.* 517. *L. Ev.* 181. 1 *Morg. Ess.* 331.—But Judge ASHE, *contra*, relying upon *Salk*. 28. *Greene & Crain*, and *L. Ray.* 1101.—But by both of the Judges, the jury in this case have found the debt not barred by the act of limitations ; whereas it is contended by the Counsel, it really was barred : suppose this to be true, yet this verdict, although it be against evidence, has done justice between the parties, and therefore the Court will not grant a new trial.—Where the equity and justice of the case is with the verdict, the circumstance of its being against evidence, is not of itself sufficient to set aside the verdict, and a new trial was refused. (14)

NOTE.—The case of *Sarel, adm'r v. Wine*, 3 *East* 408, fully supports the opinion of Judge ASHE. Vide also, 2 *Sand.* 63, a note b. 1 *Chit. Plead.* 204-5. 2 *Chit. Plead.* 96. But see *Bank of Newbern v. Sneed*, 3 *Hawks*, 500. As to the point of the new trial, Vide *Allen v. Jordan*, 2 *Hay.* 132. *Jones v. Zollicoffer*, 2 *Hawks*, 492. *Smith v. Shepard*, 1 *Dev.* 461.



HILLSBOROUGH, APRIL TERM, 1792.

———— v. Jackson.

A person, who did not make it his ordinary employment, undertook to carry goods for hire ; he is not to be taken as a common carrier, and liable to the same extent, but is bound only to common prudence.

The Plaintiff, a merchant, employed the Defendant, for a reward, to bring goods and merchandize from Virginia, to Hillsborough, in this State, in his waggon ; the Defendant received the goods in Virginia, and in bringing them to Hillsborough, when about to cross a river, the flat receded from one of the fore wheels of the waggon, and it ran with the goods into the river, and the goods were greatly damaged and impaired in value. The Defendant did not make it his common and ordinary employment to carry goods, but was employed on this occasion only. *Moore* for the Plaintiff (at a former term when this case was on trial) insisted that any person who undertakes for hire or reward to be given him, to

Apr. 1792. carry goods for another, is a common carrier, and liable to indemnify his employer against all damages that may happen to the goods, except by a public enemy, or inevitable accident. He cited *L. Ray*. 915. *Salk*. 143. *Bul. Nisi Prius*, 170. *Salk*. 282. TAYLOR *e contra*, insisted that however the law may be in respect of common carriers, who undertake, like all other persons exercising public employments, for skill and diligence in their profession, no such undertaking is implied, or expected, from one who undertakes, at the request of another, to perform a business which he does not make his common employment; and he is only answerable for damages where he is guilty of gross neglect. 3 *Bl. Com.* 165. The jury found for the Defendant. The Court granted a new trial, saying the verdict was against law, as the Defendant, by reason of the reward, was to be considered as a common carrier. At this term the cause being again tried, Moore for the Plaintiff, Haywood for the Defendant, who said one part of the definition of a common carrier is, (15) "that he was a person liable to be sued by the Plaintiff, if he refused to carry the goods for him, for the common reward; and is such a person who undertakes to serve all persons indifferently." *Salk*. 249. 1 *Ba. Ab.* 344. The word *common* is added to distinguish him from one who undertakes for hire, on a particular occasion, to carry goods for another, who is not answerable in all events, but only for neglect. *Cro. Ja.* 262. The latter is only subject to rules of law formed on natural justice, the former is liable to an additional rule flowing from policy and dictated by necessity—he is a public servant, employed by every one, by those who do not know him, as well as by those who do—he has frequent opportunities of procuring himself to be robbed, or of divesting himself of the goods unfairly, without a possibility of detection, and the public would have no security unless inevitable accident or irresistible force, were his only grounds of excuse, and these to be fully and fairly proven by himself. Being a person in public employment, the law requires of him security to the public for his good behaviour, and obtains it by imposing on him general responsibility, with only two exceptions. *Salk*. 282. *L. Ray*. 918. True it is, the books say in some instances that persons carrying goods for hire are common carriers, and they sometimes speak of carriers only, without the additional word *common*. But these are inaccuracies, and to be

explained or understood in a manner which accords with Apr. 1792.
 the spirit, not the letter of the case. A person carrying
 goods for hire, must be intended of one who makes it his
 common employment, and the means of his livelihood.—
 2 *L. Ray*. 918—and where it is said a carrier is abso-
 lutely liable, must be understood of a person of that des-
 cription. Suppose the Plaintiff, in the present case, had
 gone to the Defendant's with the common price for the
 carriage of goods from Virginia to Hillsborough, and
 required of him to proceed to Virginia and receive the
 goods, and to bring them to Hillsborough—might not
 the Defendant have refused?—Was he bound to under-
 take the business assigned him? No, certainly he was
 not. And why? Because he had not undertaken to
 serve the public generally; or in the words of my *L.*
Holt, (*Salk*. 249,) “all persons indifferently for hire in
 carrying goods from place to place.” If he is not thus
 bound, he is not that common carrier spoken of in the
 law-books, and in the cases produced, who is liable in all
 events, except for the acts of God, and public enemies—
 and he must then stand upon the ground of a person
 whose common business it is not, undertaking to do an
 act for another at his request and for him—the employ-
 er knowing him not to be commonly conversant in that
 business, 3 *Bl. Com.* 166. In other words, he is not lia-
 ble to the political rule before mentioned, but to the rule
 only which results from natural justice, which requires
 no more of him than common and usual prudence, and
 diligence in the performance of what he has undertaken,
 and does not subject him to answer for accidents which
 have not happened for want of that prudence and dili-
 gence. Of this opinion were the Court, consisting of
 MACAY and WILLIAMS, and under their direction, the
 jury found for the Defendant.

(16)

NOTE.—Vide, as corroborative of this decision, *Jones's Law of Bail-ments*, 106. On the subject of common carriers in this State, vide *Spiry v. Farmer's adm'r.* 2 *Hay*. 339. *Williamson v. Branson*, 1 *Mur.* 417. *Backhouse v. Snead*, *Ibid.* 174. *Adam v. Hay*, 3 *Mur.* 149.

Berry's Adm'rs. v. Pulliam.

Ruled *per curiam* upon argument, that letters of admi-
 nistration need not remain in Court, and are not de-
 mandable after issue joined, and cited *Wymark's case*, 5
Rep. 74.

Apr. 1792.

2dly. That the administrator may sue as administrator upon his own possession ; and that it is better for him to sue in that manner, because then the judgment affords evidence against him of assets.

3dly. That the act of limitations will not run, where A detains the chattel of B, but only from the time when B knows where the chattel is, and that the same is adversely claimed. Vide 3 Rep. 79 b.

NOTE.—As to the last point vide *Ellmore v. Mills*, post 360. Upon the first, see the *Ex'rs. of ——— v. Oldham*, post 165.

Moore v. Suttril's Adm'r.

Doctor Umstead was sued as administrator in right of his wife, a *capias* issued to Chatham, where he did not live, &c. Objected by Mr. Moore, a *capias* ought not to have issued, but a summons ; and the attachment is irregular, being founded on such a *capias* ; and the suit is improperly brought, it ought to have been against Mrs. Umstead also, for suppose she had died, it would have abated—if he had died, it would have abated also, as the case is circumstanced : but had it been brought against both, and he had died, it would have survived against her. The Plaintiff being not ready, was nonsuited.

NOTE.—Vide *Chitt. Plead.* 43.

Rhodes v. Brownlow.

(17) Ruled *per curiam*, that a writ of false judgment is to be obtained upon affidavits, which may be opposed by affidavits on the other side ; and the Court, upon consideration of the affidavits, will either dismiss the writ, or proceed to do what else is proper to be done on examination of the proceedings below : and that upon the obtaining of this writ, the falsity of the judgment below is to be assigned in the manner mentioned in *Nelson's Abridgment, Verb. False Judgment* : And that it differs from the assignment of errors, Vide *Co. Litt.* 60.

NOTE.—Vide *Anonymous*, post 398. *Anonymous*, post 469. *Coke Lit.* 288, b.

Allen v. Williams, Garnishee.

Allen sued Hamilton by attachment in the County Court of Granville, and Williams was summoned as a garnishee, attended four days, and by the record it did not appear he was solemnly called as the act directs, or

that any *sci. fa.* had ever issued against him: but yet ^{Apr. 1792.} judgment was entered against him. On the part of the Plaintiff below, it was acknowledged there was error in the proceedings; but it was insisted on for him, that a writ of error should be brought, and not a *certiorari*, as had been done in the present instance. *E contra*, the Counsel for Williams, the garnishee, cited *Salk.* 263, and insisted that the *certiorari* lay in this case, and indeed was the only proper writ, the attachment law being not according to the course of the common law; and so the Court determined, and reversed the judgment against the garnishee.

NOTE.—*Fryar's adm'rs v. Blackmore's adm'rs.* 2 Hay. 374. 2 Sand. 101, note 1.

HALIFAX APRIL TERM, 1792.

James Tiller Gee v. Jarret Young.

Case for the use and occupation of a plantation. Young had married the widow of Drury Gee, to whom Drury had devised the plantation for her life, remainder to the Plaintiff. She died the first of April, 1789, and the Defendant had then sown part of the land in oats, and other parts he had broken up and prepared for the reception of Indian corn. The following cases were cited to wit, 2 *Inst.* 81. 2 *E. C. Ab.* 464. 2 *Bl. Com.* 122, 146, 403. *Co. Litt.* 55. 5 *Rep.* 116. *L. Ev.* 242 to 252. And by SPENCER, who delivered the opinion of the Court, the Defendant ought to be allowed for his labor in preparing the ground for tillage, that is, the ground intended for Indian corn; but yet the Plaintiff is entitled to recover, and recommended to the jury to give a verdict for the Plaintiff for the value of the use of the plantation, after deducting the value of the Defendant's labor: which was done accordingly, and Plaintiff had judgment.

NOTE.—*Vide Tol. Law of Ex'rs.* 204.

Clements & Co. v. Eason & Wright.

(18)

This was an action of covenant, brought upon an instrument executed by two, and appearing to be under seal, but not attested by any subscribing witness. There was no witness to the execution, but proof was offered by

Apr. 1792. the Plaintiff, of an acknowledgment by one of the covenantors that the instrument was executed by both : which Judge SPENCER would not admit, and no other evidence being offered, the Plaintiff was ordered to be nonsuited ; the Court saying, he ought to have brought his action on the case, and proof that the instrument was acknowledged, is no proof of the sealing, and will not make it to be a deed.

NOTE —The case of *Ingham v. Hall*, overrules the objection that case, and not covenant or debt, is the proper action upon an unattested sealed instrument. *Post* 193. The other objection would now be equally untenable. It is a rule well established, that the subscribing witness to a deed or other sealed instrument, must be produced to prove its execution. *Ormichund v. Barker*, 1 *Atkins*, 49. *Abbot v. Plumbe*, 1 *Doug.* 216. This rule is never departed from, except the witness is dead, not to be found after diligent enquiry, removed beyond the process of the Court, become infamous, or interested by operation of law. *Adam and Wife v. Kers*, 1 *Bos. & Pul.* 360. *Coglan v. Williamson*, 1 *Doug.* 93. *Prince v. Blackburn*, 2 *East.* 250. *Jones v. Mason*, 2 *Strange.* 833. *Cunliffe v. Sefton*, 2 *East.* 183. *Nelius v. Brickell's adm'r.* *post* 19. *Jones v. Brinkley*, *post* 20. *Johnston v. Knight*, 1. *Murph.* 293. *Selby v. Clark*, 4 *Hawks*, 265. Nearly all the cases concur, under these circumstances, in requiring proof of the witness's hand writing, and from the case of *Mitward v. Temple*, 1 *Camp. N.P. Rep.* 375, it would seem that the proof of his hand-writing would be sufficient, without proving the hand-writing of the obligor. In the State of N York, it has been expressly so adjudged. *Mott v. Dougherty*, 1 *John. Ca.* 230. *Sluby v. Champlin*, 4 *John.* 161. Where there is a subscribing witness, it has been expressly decided, that the acknowledgment of the obligor is not sufficient proof of the execution of the bond. *Abbot v. Plumbe*, and *Cunliffe v. Sefton*, cited above. *Call v. Dimming*, 4 *East.* 53. *Johnston v. Knight*, 2 *Murph.* 237. Where the subscribing witness is dead, and his hand-writing cannot be proved, proof of the obligor's hand-writing will be admitted. *Jones' adm'r. v. Blount's ex'rs.* 1 *Hay.* 238. If there be no subscribing witness, or if the name of the subscribing witness can be shown to be in the hand-writing of the obligor, or if the subscribing witness, upon being called, cannot prove the execution of the bond, other evidence may be received, as of the obligor's hand-writing or his acknowledgment of the instrument. *Ingham v. Hall*, cited above. *Allen v. Martin*, 1 *Car Law Repos.* 93. *Holloway v. Lawrence*, 1 *Hawks*, 49. Where a subscribing witness leaves the State in the exercise of a public duty, (as in the case of a member of Congress) his hand-writing may be proved. *Selby v. Clark*, 4 *Hawks*, 265. See also 1 *Philips on Evidence*, 419, 420. (3 Am. Ed.)

HILLSBOROUGH, OCTOBER TERM, 1792.

Dook v. Caswell.

Debt on a single bill, and payment pleaded : the bond has been assigned by Dook, the obligee, to Benton, and

had the assignment scratched out with a pencil.—Ob. Oct. 1792.
 jected, the assignment had transferred the interest of the bond to Benton, and therefore his executors were the proprietors. To this it was answered, the assignors having possession of the bond, is evidence of his having paid the money to the assignee, and that enables the assignor to sue in his own name; besides, the indorsement was struck out. Judge ASHE, the possessor had a right to strike out the indorsement, and now the case is no more than that of a bond made to the obligee, which he has an undoubted right to recover the money upon: and so a verdict was given for the Plaintiff and he had judgment.

NOTE.—Vide *Smith v. St. Lawrence*, post 174.—*Strong v. Spear*, post 214.—*Dickinson v. Van Noorden*, 1 *Car. Law Rep.* 497.

Tune v. Williams.

Judgment had been given for the Plaintiff on a bond, in the County Court of Warren, for twenty-nine pounds; and Williams alleging he ought to have credits to a considerable amount, Plaintiff agreed to come to a settlement, and credit the judgment with such sum as he had paid: they came to this settlement, and credited all but fifty shillings; and Williams assumed to pay that sum if Mr. Lyne had not paid it for him to the Plaintiff. Mr. Lyne in fact had not paid it, and a warrant was brought upon this assumpsit, and judgment for Plaintiff: and the suit removed by *certiorari* to this Court. Upon the evidence here, it was objected by Col. Davie, that there being a judgment now existing for this fifty shillings, no action upon assumpsit could be brought for it; and so ruled the Court and nonsuited the Plaintiff. Col. Davie (19)
 cited *Bull.* 128, which cites *Cro. J.* 206.

NOTE.—Vide *Bain v. Hunt*, 3 *Hawks*, 592.

HALIFAX, OCTOBER TERM, 1792.

Nelius v. Brickell's Administrators.

Proof of the hand-writing of the wife of obligor is not admissible.—
 The mark of a subscribing witness, who is dead, may be proved to let in testimony of the obligor's hand-writing.

Debt on a bond, and general issue pleaded. The bond was attested by Nancy Brickell, the wife of the obligor,

Oct. 1792. and by another person who made his mark. The Plaintiff's attorney would have proven the hand-writing of Nancy Brickell, relying on the case in *Stra. p. 34*, where a witness to a bond having become the administrator of the obligee, proof of his hand-writing was admitted.—*Sed per curiam*, in that case the witness was competent at the time of his attestation, and having become disqualified whilst living, by being a party to the suit, his hand-writing was the best proof which could reasonably be expected; but here the witness was incompetent from the beginning, and if she could not be admitted as a witness, much less ought her hand-writing to be received as evidence; but the Court said, if you can prove there was once such a man as that who has made his mark, and that he is now dead, or not to be found, and also that he used to make his mark in the manner that it appears to be made to this bond, it will be such a presumption as will let you into the further proof of the hand-writing of the obligors, like the case in *Douglass, p. 93*, of *Coghlan v. Williamson*. Whereupon the Plaintiff's attorney proved there was such a man, who was alive about the time of the date of the bond, in the neighborhood where it was given, and that he was dead; and that he used to make his mark as it appeared upon the bond; and that the name of the obligor was in the obligor's hand-writing: and he had a verdict and judgment for the Plaintiff.

NOTE.—Vide *Swire v. Bell*, 5 Term. Rep. 371.—Note to *Clements and Co. v. Eason & Wright*, ante 18.

Cowper v. Edwards, Adm'r. of Webb.

(20) Action of debt against Defendant, naming him executor. Plea in abatement, that he is administrator and not executor. Plaintiff moved to amend upon the act of 1790, and cited *Strange 890*, where after issue joined, the court permitted an amendment, by laying the assumpsit to be made to the Plaintiffs themselves, instead of its being made to their testator: but the Court said, the act of 1790, is but a repetition of the provisions before made by the acts of amendment and jeofail, and that by this act nothing could be amended, but what the other party might have demurred to, and specially set down as the cause of his demurrer, which was not the case in the present instance. The amendment of writs, to make

that maintainable which before the amendment was not Apr. 1793. so, might be productive of great hardship; for very possibly the reason of the bail entering into a bail bond, was his knowledge that the action on the defective writ could not be supported, and then the amendment would entrap him: so the motion was denied.

NOTE.—Our Judges have expounded the act of 1790 with great liberality saying, “any thing may be amended at any time.” Vide *McClure v. Burton and others*, 1 Car. Law Rep. 472. *Davis and another v. Evans*, Ibid. 499. *Williams v. Lee's Heirs*, N. C. Term Rep. 146. *Justices of Camden v. Sawyer*, 2 Hawks, 61. *Boyl v. Cooper*, 2 Murph. 286. *Wilcox & Co. v. Hawkins*, 3 Hawks, 84.

Merrit v. Merrit, and Brehon v. Tuton's Adm'r.

Plaintiffs in these respective suits had recovered judgments, and executions having been issued against the Defendants respectively, *nulla bona* were returned: and thereupon in the latter of these causes, the clerk had issued execution for Plaintiffs costs, against the Plaintiff himself: and the propriety of this measure being moved to the Court, they said unanimously, that the Plaintiff is liable for his own costs where the Defendant is insolvent, and that the Clerk was justifiable in what he had done.

The original note of this case is without date, and perhaps it may be misplaced in point of time.

NOTE.—Vide *Superior Court Office v. Lockman*, 1 Dev. Rep. 146.

HILLSBOROUGH, APRIL TERM, 1793.

Ferguson and Wife v. Taylor.

Plaintiff's wife, while *sole*, lent to Defendant specie certificates, to be returned in three weeks, or at any time when requested. The Plaintiff did not bring suit until after the expiration of three years from the end of the three weeks: but Plaintiffs proved Taylor had acknowledged the receiving the certificates within three years before the action brought; and said he had not settled for them, but would pay them to the administrator of Plaintiff's first husband, one Leonard. Per Judge MACAY, here is no acknowledgment of the debt, but only acknowledgment it was not paid—there must be an acknowledgment of the debt. The authorities cited, which are 2 Burr. 1097, and Doug. 652, went upon the acknow-

Apr. 1793. Judgment of the debt, not of a fact which shews it to be unsatisfied: and the jury found accordingly.

NOTE.—Vide *Bank of Newbern v. Sneed*, 3 *Hawks* 500, in which the Counsel took an extended view of all the cases upon the subject, and the Court recognised the principle of those which require an acknowledgment of a present subsisting debt to take a case out of the statute.

Jones v. Brinkley.

Debt upon two bonds subscribed by a witness, who upon search could not be found. This being proved to the Court, his hand-writing was proved, and the bond given in evidence.

NOTE.—Vide note to *Clements & Co. v. Eason & Wright*, ante 18.

HALIFAX, APRIL TERM, 1793.

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Hightour v. Murray.

Hightour had sued one Bowers, who had removed to avoid his creditors, by original attachment; and Murray had replevied the property attached. Hightour obtained judgment in the County Court of Franklin, and Murray surrendered Bowers as his bail in discharge of himself. Hightour then took his *sci. fa.* against Murray, to subject him to the debt, alleging he had no power to surrender, having become bound for Bowers's performance of the judgment of the Court—the County Court gave judgment for Murray. Upon which Hightour appealed, and now on full argument of this case, by *Davie* on the part of Murray, and *Haywood* for Hightour. *Per WILLIAMS and ASHE*, Judges, an original attachment is only intended to compel appearance, and where sureties are given, they are exactly to all purposes as bail, and may surrender; so the Defendant had judgment in his favor.

NOTE.—Vide *Act of 1777*, *Rev. ch. 115, sec. 30—1 Sand. 67, note 1.*

EDENTON, APRIL TERM, 1793.

Decrow v. Mone's Executors.

Trover. In this case the Court, consisting of Judges *ASHE* and *WILLIAMS*, decided that Trover would lie against executors for a conversion in the time of their

Vide ante
4, post 308
362.

testator. Vide *Cowper* 371.—4 *Mo.* 404, and a case at Sep. 1793. Wilmington, May 1796.

NOTE.—Vide note to *McKinnie's ex'rs. v. Oliphant's ex'rs.* ante 4.

Snoden v. Humphries.

This was an action of debt, and verdict for the Plaintiff. Motion in arrest of judgment, and upon argument the motion overruled. From which sentence the Defendant appealed, and now on motion of *Mr. Hamilton*, that the cause should stand not on the reasons in arrest, but as a new cause on the issue to the country; it was so ruled *per curiam*, consisting of Judges ASHE and WILLIAMS. *Ex relatione.*

NOTE.—Vide *Burton v. Sheppard*, post 399.—*Erwin & Wife v. Arthur's Ex'rs.* *Con. Rep.* 490.—*State v. Jackson & Davis*, 3 *Murph.* 230.

MORGANTON, SEPTEMBER TERM, 1793.

Hayle v. Cowan.

Petition to rectify error in a patent, heard by the Court without the intervention of a jury; and the error was ordered to be rectified agreeably to the act of Assembly. This was in the case of a royal patent, and Hayle had summoned four witnesses, the dispute being only whether the first line described in the certificate annexed, was really north 54 degrees east, or south 54 degrees east. *Mr. Avery* then moved, that as two of these witnesses had not been sworn at all, and as there could be but one fact to be established, that the Defendant should not be subject to the payment of these two witnesses: but *per curiam*, you informed us a while ago, you had a witness summoned who does not attend; these two witnesses not sworn, might be intended to counteract his testimony, and your not producing him might be the reason why they were not called upon; we cannot undertake to say they were to prove the same fact the other two were sworn to—the motion denied *per Judges ASHE and MACAY.* (22)

NOTE.—Vide *Carpenter v. Taylor*, *N. C. Term Rep.* 265.

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HALIFAX, OCTOBER TERM, 1793.

Bradford v. Hill.

In the case of boundaries expressed in deeds and patents, the courses and distances mentioned in such deeds or patents, must be observed, except when a natural boundary is called for and shown, or when marked lines and corners can be proved to have been made at the original survey.

Ejectment. The boundaries expressed in the deed to Bustin, under whom Hill claimed, were—Beginning on Fishing creek, thence east 320 poles to Pollock's corner, thence north same number of poles to Bryant's, thence along Bryant's line west 320 poles to the creek: Bryant's corner being four degrees to the east of north from Pollock's corner, the line from Pollock's corner intersected Bryant's line considerably to the west of Bryant's corner. It was proven there was an old marked line, leading from Pollock's to Bryant's corner, but that in running by the compass from Pollock's corner north 54 degrees east, which was the general course of that line, the marked line would be sometimes on one side, sometimes on the other side of that run by the compass; whence it was taken by the jury, to have been run by some person after the survey; the triangle formed by the said north line, part of Bryant's line, and a line from Pollock's corner to Bryant's corner, included the land in dispute. It was insisted for the Plaintiff, that the expression of the word *north* was a mistake in the surveyor, as the line would give but about half the complement of acres; that it would not measure the distance called for by the deed, as it would intersect Bryant's line before the distance was gained, and because from the point of its intersection with Bryant's line, along Bryant's line to the creek, would be only 130 poles; whereas, the deed called for the whole length of Bryant's line, to wit, 320 poles. Add to this, that the true grammatical construction of the words used in the patent, to Pollock's corner, thence to Bryant's, will determine the sense to Bryant's corner, not to Bryant's line, there being no line antecedently mentioned. *E Contra*, it was argued by *Davie*, and agreed to by Judge WILLIAMS, that in all cases where there are no natural boundaries called for, the dispute must be decided by course and distance, or by proving the line and corner: that supposing the marked line running from Pollock's to Bryant's corner, not to be the line run by the surveyor, there was nothing

but the description of the deed by courses and distances to direct us : that indeed, if the line was terminated by a natural boundary, then if the distance expressed in the deed was shorter than the distance to that natural boundary, the distance expressed in the deed would be disregarded. It is true, mistakes have been committed by surveyors, but on account of the great danger there would be, of controlling deeds by parol testimony, they must be adhered to, unless in cases of very obvious mistake, and where the evidence of the mistake is of a nature hardly capable of deceiving us—as where there was a line, and marked trees, and a corner, which could be proven to be the line run by the surveyor ; in which case the mistake should not prejudice, for there would be not only parol evidence to control the deed, but the additional evidence also of the marked line and corners where nature itself would lend its aid to evince the error by the appearance of the line and in proving its age.

In this case, the cases of *Branch and Ward*, of *Eaton and Person*, and of *Person and Roundtree*, were cited.—The case of *Branch and Ward* was said to be this—Beginning on the creek, and running north and so round to the creek, and along that to the beginning ; but expressed in the patent to be beginning on the creek, thence running south and so round to the creek, whereby the land was thrown upon the opposite side of the creek ; but that it was proven on the trial, that there was a north line, and a corner marked at the termination of it, the same that was mentioned in the patent ; that the line was old enough to have been made when the land was first surveyed, and that was the line run for the patentee by the surveyor. Upon which evidence the Plaintiff recovered. *Eaton and Person* was—that the land in fact was included in a first, second and third line, and a river for the fourth ; but the deed, after describing the first line, called next for a course and distance which carried the second line through the body of the land, leaving out a triangular piece included in the second and third lines really run ; but the second and third lines really run, were marked and proven, and the corners also, by persons present at the running them for the patentee : and upon that, by direction of the Court, the claimant under the patentee recovered. *Person and Roundtree*, it was said was a similar case to the last, but that these were the only cases where the Court had ever

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Mar. 1794. ventured to depart from the letter of the deed or patent; and the claimant under the patentee in the present case, not being able to prove a line run by the surveyor for the patentee, between these two corners, the jury, under the direction of Judge WILLIAMS, then the only Judge in Court, found a verdict against him.  The other party claimed the triangular piece in dispute, by a State grant of a late date.

NOTE.—Vide the case of *Cherry v. Slade's Adm'r.* 3 *Murph.* 82, in which the Chief-Justice makes an able review of all the cases upon this subject, and from which he deduces four rules relative to boundary. 1st. That whenever a natural boundary is called for, in a patent or deed, the line is to terminate at it, however wide of the course called for, it may be; or however short or beyond the distance specified. 2d. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. 3d. Where the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance, provided those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary. 4th. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascertained and identified by evidence: or where no lines or courses of an adjacent tract are called for; in all such cases, we are of necessity, confined to the courses and distances described in the patent or deed. Vide also, *Reddick and Wife v. Leggat*, 3 *Murph.* 539. *Orbison v. Morrison*, *ibid.* 551. *Campbell v. McArthur*, 2 *Hawks*, 33. *Slade v. Green*, *ibid.* 218. *Tatum v. Sawyer*, *ibid.* 226. *Fruit v. Brower*, *ibid.* 337. *Haughton & Slade v. Ruscoe & Gray*, 3 *Hawks*, 21. *McNiell v. Massey*, *ibid.* 91. *Tatum & Baxter v. Paine & Sawyer*, 4 *Hawks*, 64.

SALISBURY, MARCH TERM, 1794.

Den on dem. *Osborne v. Woodson.*

In ejectment, the word tenement with metes and bounds is sufficiently certain. Sale of land by Sheriff, when there is sufficient personal property, is good as to purchasers. The want of forty days advertisement, or the land's not being sold until a day or two after the day appointed, will not vitiate the sale. *Dictum* by the Court, if a Sheriff sells real property, when there is sufficient personal, he will be liable to an action by the party grieved, unless the party does not show personal property sufficient to satisfy the execution.

Ejectment. The declaration stated the lease to be of a messuage and tenement, bounded by metes & bounds particularly expressed, including a tract of two hun-

dred and sixty-three acres of land. Objected—this description is too uncertain.—The word tenement is so uncertain, the Sheriff will not know how to deliver possession.—But *per curiam*, it is certain enough, the word *tenement* includes all things which may be holden; and a tenement bounded in such manner as described in this declaration, is the same thing as a parcel of land so described, and as certain and more legal. The Defendant's attorney then informed the Court he was prepared to prove, that the Sheriff who sold this land to the Plaintiff under an execution issuing from Hillsborough Court, in behalf of the State, has seized the land when there was personal estate enough in the Defendant's possession to satisfy the debt; and also that the Sheriff had not sold the land on the day appointed by the advertisement, but a day or two afterwards; and also that he had not advertised for the space of forty days previous thereto, as the law required: and if the Court thought these evidences material, that he could produce them.—Thereupon Judge WILLIAMS said, if the Sheriff sells real property, when there is personal enough, it makes the Sheriff liable to an action of the party grieved, but will not vitiate the sale to the purchaser; otherwise no man would be safe in purchasing lands at a Sheriff's sale, and that he had never known it required that the Plaintiff in such case, who was the purchaser, should prove forty days advertisement, which it certainly would have been at some time or other, if it ever had been thought material or necessary; and moreover, the Sheriff may lawfully sell the land of the Defendant, where he does not show him personal property sufficient to satisfy the execution; it would be absurd to say, that the sale of land should in no case be good, where the Defendant had personal property; were this the law, the Defendant might conceal his personal property. Suppose the Sheriff comes with his execution, and the Defendant shuts his doors against the Sheriff, the Sheriff cannot break them open; and shall this disappoint the judgment creditor? As to his not selling on the day appointed, but a day or two after, this is not absolutely unlawful; he may adjourn his sale, sometimes for the benefit of the Defendant, when he expects a better day or more bidders, and gives notice to those attending, that the sale will be made at that future day: sometimes indeed the Sheriff may have so many goods to sell to satisfy the ex-

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Mar. 1794. execution, that he cannot make sale of all in one day ; and shall he then be obliged to wait till another ten or forty days shall intervene ? No, he shall continue the sale by adjournment till the whole be sold :—so the Plaintiff had a verdict and judgment.

NOTE.—On the first point, vide *Adams on Eject.* 22, according to which it seems that in England the word tenement is not sufficiently certain in an ejectment, though it does not appear that the English cases had the additional designation by metes and bounds, vide also *Byrd v. Clark*, 2 *Car. Law Rep.* 622. As to the other points, vide *Governor v. Carter & others*, 3 *Hawks* 328—*Act of 1820, Rev. ch. 1066*, and the case of *Pope v. Bradley*, 3 *Hawks* 16, decided thereon.—*Jones v. Fulgham*, 2 *Murph.* 364.

Esther Kenedy v. Isaac Alexander.

Notice to take a deposition at a certain place in Tennessee on the 5th or 6th days of a particular month, held good.

Vide *Car. Law Rep.* 471. The notice given by the Plaintiff of taking the deposition of one Jones, who lived near Knoxville, that it would be taken on the fifth or sixth days of such a month, and it was taken on the fifth—Objected for Defendant : that this notice is not properly given, for if he might say on the fifth or sixth, he might go on and say, or on the 7th or 8th, and for a long time : but *per Judge WILLIAMS*, in a case at Newbern on the last circuit, one of the parties had given notice of taking depositions at Albany in such a week ; and it was held a good notice ; because at so great a distance, the taker of the deposition, might not know how to procure the witness's attendance on any particular day ; the witness might be absent, or not be found ; after going thither, some accident might delay the party intending to take the deposition ; and he might not arrive on the very day, and it would be extremely inconvenient, to force him first to go thither, and know when the witnesses would attend, and then come back and give notice of the time, before he could take the deposition—wherefore in this case let the deposition be read, and it was read accordingly.

NOTE.—Vide *Harris v. Peterson*, 2 *Car. Law Rep.* 471—*Bedell v. State Bank*, 1 *Dev. Rep.* 483.

Den on dem. of Tyce v. Ledford.

Mar. 1794.

Where a cause had been depending three years in the County, and five years in the Superior Court, and the Plaintiff for the last three years had been uniformly ready for trial, the Court ordered the Defendant to pay the costs of the Plaintiff's witnesses during the term as the condition of another continuance.

Defendant made an affidavit in the usual form, that one Davis was a material witness for him; that he had been summoned and did not attend, &c. But on the other side it being alledged, that this cause had been depending three years in the County Court, where at length the Plaintiff obtained a verdict; that the Defendant then appealed to this Court, where the cause had been depending five years; that the Plaintiff for the last three years had been uniformly pressing for a trial, and the Defendant delaying it under various pretences; and the act of 1779 being read and insisted on, which directs that where the Judge shall be of opinion that the party praying a continuance, ought not to obtain the same without payment of costs, that the Judge may require him to pay the costs of that term before granting the continuance; and that though afterwards he should eventually prevail, that he should not be allowed such costs in the taxation of costs. The Court in this case, Judge WILLIAMS being on the bench, made such order; and the Defendant before the continuance granted, was required to pay, and did pay the costs of the attendance of all the Plaintiff's witnesses during the term; and some of the bar requesting to know if this was intended to be a general rule for the future, the Judge answered no—only for cases circumstanced like the present.

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NOTE.—Vide *Park v. Cochran & others*, post 178.

Hughes v. Giles. Trover for a horse.

A and B both have bills of sale for a horse from a person who had borrowed him for a particular purpose; A, whose bill of sale is the oldest, has him in possession, B by some means gets him from A, and sells him to C. A is entitled so recover him of C in the action of trover.

The case was, A intrusts the horse to B for a particular purpose; B remains at Salisbury sometime, and contracts debts with several persons, and gives a bill of sale for the horse to Hughes, and also to one Brem; his sale to Hughes is prior to the date of the bill of sale to Brem. Brem by some means gets possession of the

Mar. 1794. horse from Hughes, who had him, and sells to Giles—
 and now amongst other things it was insisted for Giles, that Hughes ought not to have a verdict against him and recover damages, for that a recovery by Hughes, who was not the proprietor, would be no bar to A, to hinder him from bringing his action at a future day against Giles, and recovering also. The books indeed say, that he who has a special property may recover in this species of action, as in the case of a carrier, bailee or finder, a Sheriff who has seized goods in execution, or the like; but the reason is, that those persons are liable over for the goods to a third person, and they are allowed this action, in order that they may have it in their power to indemnify themselves, by recovering against the wrong doer, that value which they have to pay to the owner; and it is because they are entitled to recover, that they are said to have a special property; but surely if the carrier, bailee, &c. voluntarily sell or dispose of the property, they cannot afterwards maintain an action for it, they are stopped by their own act; but yet their sale conveys no property, because they had none themselves; and in order to convey an interest or property by sale, the vendor must have the general or absolute property; a special property only enables him to sue a wrong doer, not to convey the property; because in so doing he commits a breach of trust, unless where he has the property for the purpose of selling it, as in the case of the Sheriff, and then what he does is only good by virtue of his authority. That the conveyance of such persons in general conveys no property, is proved by this, that if the carrier, bailee or finder sells it, his vendee is liable to the action of the owner; but in this case, B who sold both to Hughes and Brem, though he is liable to A's action, yet he cannot recover against either of them; because as to him they are neither of them wrong doers; and surely the Plaintiff Hughes cannot be said to have a special property, that comes only by the delegation of the owner, and *potestas delegata non potest delegari*. This is not in the circumstances of a carrier, bailee, &c. or of any of those persons who are liable over by means of a trust; and as there is no such liability over in his case, there is no reason why the law should give him an action to recover against the Defendant. If he should not recover, he can never be charged by A: what reason then is there to say he ought to recover, when he has not

the general property, and when there is no necessity that he should be deemed to have a special one in order to his own indemnification? But *per WILLIAMS* Judge, notwithstanding these arguments, the Plaintiff has a right to recovery. Hughes had purchased the property that B had, and was in possession; and is to be considered as having a special property, until a better could be shewn; and no one but the right owner could interfere with his possession, or lawfully deprive him of it; this is an advantage which should not be taken from him by a third person—so the Plaintiff had a verdict and judgment. Apr. 1794.

NOTE.—The case of *Laspeyre v. McFarland*, *N. C. Term. Rep.* 187, decides that trover cannot be maintained on the possession of a chattel, where it appears that the legal title is in another, and that the Plaintiff has only a trust. But see the cases on this subject collected in 2 *Sand.* 47, *a. note* 1. The Court in *Laspeyre v. McFarland*, seem to intimate that trespass would have lain in that case, and authorities are cited in *Sanders* to show that wherever trespass will lie for the wrongful taking of goods, trover will also lie; for one may *qualify* but not *increase* a tort.

HILLSBOROUGH, APRIL TERM, 1794.

Elwick's Ex'rs. v. Rush.

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Demand is necessary to sustain the action of detinue, and it must be made by the claimant himself, or by some person for him, and so made known at the time of the demand. Said *arguendo* by the Judge, that the statute of limitations begins to run from the time, that the Plaintiff knew where the negroes were, and that the Defendant claimed them as his own, although no demand had been made.

Detinue. Plaintiff by one Tally, proved that Barton, who was a legatee, went with him to Rush, and informed Rush that the negroes mentioned in the declaration were of the estate of Elwick; that he, Barton, was a legatee, or heir of that estate; and that Col. Taylor was executor and demanded the negroes.—*Et per* Judge WILLIAMS, a demand is necessary to entitle to the action, and it must be made by the Plaintiff, or by some one by his authority; here he did not inform the Defendant of his authority at the time of making the demand, or say that he demanded in the name of the Plaintiff; therefore it was not a good demand, and the Plaintiff was nonsuited. NOTE. In the arguing of this case, Judge WILLIAMS said, the act of limitations would run in detinue, without

Apr. 1794. a demand, if the Plaintiff knew where the negroes were; and that they were claimed by Defendant as his own, and did not bring suit within the time prescribed in the act: but this he said *arguendo* only. See the case of *Berry's adm'rs. v. Pullam*.

NOTE.—The opinion of the Judge on the first point of this case is doubted of by *Haywood* in his note to *Lewis v. Williams*, post 150, and overruled in an anonymous case, 2 *Hay*. 136, and *Shepard's adm'rs. v. Edwards*, *Ibid.* 186.

Waller v. Broddie.

Certiorari. The Plaintiff after obtaining the *certiorari* to remove this cause from the Court below, into which it had come by appeal from the judgment of a Justice of the Peace, had removed into South-Carolina; and now upon motion to the Court for that purpose, Judge WILLIAMS upon the bench, it was ordered, that unless by the next term or before, the Plaintiff put in sureties for prosecuting this cause, and for paying costs in case he fail therein, that this cause shall be dismissed. The Judge said upon this occasion, that the act of 1787, frequently operated with hardship, and peculiarly so, in the case of poor persons who had suffered injuries and were unable to give security; and in some cases, the Court since that act, had permitted such persons to sue in *forma pauperis*, without any such security; but as the act was passed by the Legislature, the Court was bound by it. That the word *writ*, in the act, extended to the case of a *certiorari*, as well as to cases of bills in equity; in which case it had been decided, that such security should be given.

NOTE.—The act of 1810, *Rev. ch. 793*, requires security to be taken in the same manner as in the case of appeals, and I believe that the securities in such cases are considered in the same light, as sureties to an appeal bond, and where the judgment of the Court below is affirmed in the Superior Court, judgment may be entered up *instanter* against the Plaintiff in the *certiorari* and his securities.

State v. ———

The act of 1793, authorising the Attorney-General to take judgment against the receivers of public moneys, by motion, and that their delinquencies should be sufficient notice to them, was declared to be unconstitutional and void by WILLIAMS, Judge, but was afterwards allowed by MCCAY and ASKE Judges. ASKE hesitating at first.

At the last session of the General Assembly, it was enacted that judgments might be obtained by the Attorney-General against receivers of public money, by mo-

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tion ; and that their delinquencies should be sufficient notice to them that they were to be proceeded against ; and upon this act the Attorney-General now moved for judgment against several, and produced the act to show how he was authorised so to do. Apr. 1794.

But Judge WILLIAMS stopped him, saying he could not permit judgments to be taken in that manner. That he conceived the act to be unconstitutional, it was to condemn a man unheard. The 12th article of the Bill of Rights says, "No freeman ought to be taken, imprisoned or disseised of his freehold, liberties or property, &c. but by the law of the land ;" and these words mean, according to the course of the common law ; which always required the party to be cited, and to have a day in Court upon which he might appear and defend himself. The 14th section declares, that the ancient mode of trial by Jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. The ancient mode of trial by jury was, that after the Defendant was cited, and had pleaded, and the other party had denied his plea, or some part of it, then the point in controversy was submitted to the decision of a jury ; but here, though a jury may be sworn, what will it be upon ? It will be upon a default taken against the party who does not appear and plead, because he has no knowledge that any proceedings are intended to be had against him : and so in truth it is not a trial by jury according to the ancient mode—the Defendant has no opportunity of making any defensive allegations which may be submitted to the decision of a jury ; but the jury here are merely to pronounce what is the sum to be recovered, and in this they are to be governed by the report of the Comptroller, which is made evidence against the Defendant by another act of Assembly ; so that in reality the jury have nothing to determine on—it is mere form for the sake of which they are to be impannelled—such a trial is a mere farce. I think the act unconstitutional, and I cannot, as at present advised, give my assent to its being carried into effect—the Judges of the land are a branch of the government, and are to administer the constitutional laws, not such as are repugnant to the constitution ; it is their duty to resist an unconstitutional act. In fact, such an act made by the General Assembly, who are deputed only to make laws in conformity to the constitution, and within the limits it

Apr. 1794. prescribes, is not any law at all. Whenever the Assembly exceeds the limits of the constitution, they act without authority, and then their acts are no more binding than the acts of any other assembled body. Suppose when met together, they should pass an act to continue the Assembly for two years—the constitution says it shall continue but for one—and suppose in the second year they should pass an act—would the Judges be bound to effectuate it? Surely not. No more are they bound to regard an act not made agreeable to the constitution. I am alone on the bench—I am sorry to be obliged to prevent the execution of an act which the Legislature thought necessary to be passed, and no doubt might be of public utility—but what end is an equivalent for a precedent so dangerous as that where the constitution is disregarded by the Legislature, and that disregard sanctioned by the Judiciary? Where then is the safety of the people, or the freedom which the constitution meant to secure? One precedent begets another, one breach will quickly be succeeded by another, and thus the giving way in the first instance to what seems to be a case of public convenience, in fact prepares the way for the total overthrow of the constitution—that surest palladium of our rights. I cannot consent to it—but the Attorney General, if he pleases, may again move the subject when we have reflected a little more upon it.

Next day at the sitting of the Court, *Haywood*, the Attorney-General, moved the subject again, as follows: The clauses of the constitution that are objected to the validity of this act, are declarations the people thought proper to make of their rights; not against a power they supposed their own representatives might usurp, but against oppression and usurpation in general. The second clause for instance, could not be intended as a restraint upon the Legislature; it could not be supposed the Legislature would ever attempt to oppose the right of the people to regulate their internal government; it was intended to assert the right of the people against the power of the British King and Parliament, and against all other foreign powers, who hereafter might claim a right under any pretence whatsoever, of interfering with the affairs of this government; and to serve as a standing and perpetual memento to posterity, that the least intermeddling by any foreign power with the internal policy of this government, is an invasion of their privi-

leges. Such also is the manifest meaning of the 5th section. Who were the convention suspicious of when they declared, "That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people is injurious to their rights and ought not to be exercised?" This is not a restraint upon the legislative power of the Assembly. From the experience of what had happened in older governments, they apprehended that in the vicissitudes of human affairs, some ambitious men might usurp the power of dispensing with laws, or claim the right of exercising such a power. It had been frequently done in that government which they were the most intimately acquainted with, to the great oppression of the people. They also had other reasons—the event of that dangerous war in which they were then engaged, was doubtful. In case of an adverse event, they were determined by this solemn declaration, that the rights of the people should be proclaimed and handed down to posterity—that this solemn declaration should be a monument of them, to keep the genius of freedom alive, and to impel posterity by this lesson left them by their ancestors, at some future day to erect again the standard of liberty. This I take to be the true meaning of the Declaration of Rights: and if we attend to the 12th clause, we shall find it was copied almost *verbatim* from the 29th chapter of *Magna Charta*, and of the occasion of which our Bill of Rights were very similar—the struggle of the people against oppression. This clause in both has nearly the same meaning—and then the spirit of this clause is in exact unison with the other clauses, not intended to restrain the Legislature from making the law of the land, but a declaration only, that the people are to be governed by no other than the law of the land—*per legem terræ*, were words used in the charters granted by Henry I. K. Stephen, Henry II. K. John and Henry III. whose confirmation seemed finally to give stability to this charter: and this term, in those times had a certain appropriate meaning, which in latter periods came to be a little altered. In the three former of these reigns, the term *per legem terræ*, was employed in contradistinction to the civil law, then called the *Italian law*, having been lately discovered and adopted in Italy, and which had been, or were then begun to be introduced in England in exclusion of the laws of Edward the Confessor, or in

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Apr. 1794 other words the law of England. Henry I. in his charter, promised among other things to confirm and observe all the laws of Edward the Confessor—*Goldsmith's England*, 1 vol. 133. Stephen, his immediate successor, promised a restoration of the laws of Edward the Confessor in his charter—*Goldsmith's England*, 1 vol. 145.—

(32) These laws of Edward the Confessor, were the ancient laws, usages and customs of the different parts of England, collected and digested into one code. 1 *Bl. Com.* 66. 4 *Bl. Com.* 405. It appears from the frequent stipulations contained in the charters of these times, promising to observe and restore these laws, that they had been neglected, and some other law introduced in their place. Indeed we are expressly informed of this in the preface to the 8th report, page 8, where immediately after the author has been speaking of King Stephen's character, he says, "King Stephen forbade by public edict that no man should retain the laws of Italy, formerly brought into England." In these times therefore, the term *lex terræ*, meant the English law in contradistinction to the laws of Italy, or of any other foreign country: and in like manner in our constitution, where the Convention are declaring the rights of the people, and use the words of the *Magna Charta* of England, they mean to assert in general, that the people of North-Carolina have a right to be governed by their own laws, and not to be subject to laws made by any foreign power upon earth; in like manner as in the 2d clause, they declare that the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof—by all which they mean to vindicate the sovereignty of this country, and the inherent right of the people thereof to govern themselves—the term *lex terræ*, in the times of King John and Henry III. began to have a meaning additional to what it had in the former reigns: these princes were guilty of great abuses under the pretence of prerogative—they had confiscated the estates of many of their subjects—they had exiled and destroyed many also by the power of prerogative. It is remarkable that in King John's charter it is stipulated, that no freeman shall be taken, or imprisoned, or disseised of his free tenements and liberties, or outlawed, or banished, unless by the legal judgment of his peers, or by the law of the land; and all who suffered otherwise in this and the two former reigns shall

be restored to their rights and possessions. 1 vol. Goldsmith's England, 233. This plainly evinces that the words *per legem terræ*, here spoken of, import an acting by a pretended prerogative against or without the authority of law. 1 vol. Goldsmith's England, 224, 225, 219, 220 : and thus the term, *law of the land*, is to be understood in our constitution, beside the meaning already ascribed to it, to declare, that the people of this state are not to be deprived of liberty, property, the benefit of the law, nor exiled from their country, by any power whatsoever, acting without or contrary to the established law of the country, or by any proceeding not directed or authorised by that law. The meaning of the words *lex terræ* may therefore be thus shortly defined—a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature.—(33)

This definition excludes the idea of foreign legislation, of royal or executive prerogative, and of usurped power ; and leaves the power of inflicting punishments, or rather of passing laws for that purpose, in their own Legislature only. In this sense, the *lex terræ* of North-Carolina at present is the wole body of law, composed partly of the common law, partly of customs, partly of the acts of the British Parliament received and enforced here, and partly of the acts passed by our own Legislature, 2 Inst. 46. If this body of laws, is not the *lex terræ* designated in our Bill of Rights, but the common law only, then the common law is immutable, and the Assembly cannot alter it by any legislative act. Should the Assembly in any instance attempt to alter any rule of property, with respect to its transmission, descent, &c. so as to entitle any other person to it than is entitled by the common law, he that is entitled by the rule of the common law, may say, no man is to be deprived of his property or rights but according to the law of the land, or the common law. If an act not punishable by the common law, or punishable only in a smaller degree, should be rendered penal, or more penal than it was by the common law, by any legislative act, the party to be affected by it might say, I am not to be imprisoned, or exiled, or disseised of my freehold, or in any manner destroyed, but according to the law of the land, or in other words the common law. It is easy to see into what a labyrinth of confusion this would lead us—it would contradict the very spirit of the Constitution, which in establishing a Republican

Apr. 1794. form of Government, must have been inevitably led to foresee the great alteration that the new state of things would make necessary in the great fabric of the common law: they must have intended such changes therein by the legislative power, as would more perfectly adapt it to the genius of that species of government, many of the maxims of which are so diametrically opposed to all those of the common law which have any view towards the support of the kingly power, or that of the nobles. Such a construction would destroy all legislative power whatsoever, except that of making laws in addition to the common law, and for cases not provided for by that law. It would lop off the whole body of the statute law at one stroke, and leave us in the most miserable condition that can well be imagined—all capital punishments ordained by the statute law for murder, rape, arson, &c. would be done away. and every malignant passion of the human heart let loose to roam through the land, unbridled by fear, and free from all manner of restraint, except those very ineffectual ones the common law imposes. This cannot, therefore, be the true meaning of the term *law of the land*, made use of in the Bill of Rights; it must be that which I have already contended for, or something very similar to it; and if that be the true meaning of the term, then how do these words at all imply that the Legislature have not a right to pass such an act as that which is the subject of our present discussion? Do they not on the other hand prove, that as this is neither the act of any foreign Legislature, nor the arbitrary edict of any usurped power acting independent of the people, but the act of their representatives assembled for the purpose of legislation, and to consult together for the public welfare, is such an act as ought to be respected? Does it follow, because the Constitution hath declared the right of the people to be exempted from all foreign jurisdiction, and from all power acting independently of the laws, that their own representatives cannot make a law which is useful and necessary for the public good? There is no part of this Constitution that directs the process by which a suit shall be instituted, or carried on, and the Legislature are therefore free to direct what mode of proceeding in Courts they think proper: and accordingly in a great variety of instances, both in England, after *Magna Charta*, and in this country, since the Constitution, judgments have been rendered against Defendants without

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their having had any previous actual notice, and the Judges have never intimated a doubt of the constitutionality of these proceedings. I will instance in the case of statute merchant, statute staple, and recognizance in England; there, after the recognition and day of payment arrives, no process issues against the debtor to shew whether he has paid or obtained a discharge, but execution issues without any further notice. I will instance in the case of outlawries—a man's whole property may be taken away, and yet he never may have had any actual notice of his appearance in Court being required. Both before and since the Revolution in this country, and until the year 1783, bonds, called judgment bonds, were in use here, and many judgments were taken upon them after the formation of this Constitution, without any notice at all to the Defendants, and the Judges did not say it was an unconstitutional proceeding; and I suppose it would have been practised to this day, had it not been for the legislative interposition in the year 1783. See *Rev. Laws*, c. 188. The necessity for this interposition, proves that it was an inconvenience the Judiciary could not remedy upon the ground of its unconstitutionality. Had it been such, as it was a public evil, the Judges would most certainly have opposed to it the principles of the Constitution. I would instance in the case of the attachment laws—the property of an absentee is seized, judgment is obtained against him, and his property sold, when perhaps, and very probably too, he has not the least intimation of it. The attachment law, is a law of public convenience, but yet it is liable to all the objections which have been made to this act for taking judgments; without any previous notice actually given to the Defendant, a judgment by default is taken, and the Jury is sworn to ascertain the quantum of damages, the Defendant not being present, and indeed knowing nothing of it—yet the validity of the attachment law was never questioned by the Judges, nor did they, that I ever heard, express the least reluctance to its execution. If a bill in equity is filed, and the Defendant cannot be found within the State, to be served with process, it is published in the Gazette, that such a bill is filed, and if the party should not appear by the prefixed day, though he hath no actual notice, yet a decree is passed against him. If a judgment is obtained against the principal, and two *scifas* against the bail are returned *nihil*, here a judgment

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Apr. 1794.  passes against the bail, though he has no actual notice of this proceeding, and of course no opportunity to plead in his defence a matter to be submitted to a Jury. All the confiscation laws lately passed in this country, what are they but proceedings to take away the property of absentees, who perhaps knew nothing of these intended proceedings? If to proceed to judgment before actual notice be given to the Defendant, be against this clause of the Constitution, how hath it happened that so many proceedings of this nature have been established by the uniform decisions and practice of the Judiciary? It may be fairly inferred, that all these are so many proofs that such a proceeding is not unconstitutional, and that the Legislature may enact such laws. But to obviate these objections in every shape, let it be granted for the sake of argument, that the phrase *lex terræ* in our Bill of Rights, really means the common law, and that the common law requires notice to be given to the Defendant before the Plaintiff can proceed to judgment, it also allows an exception to the rule when the Defendant voluntarily renounces that privilege by the nature of his contract.— It is one of the maxims of this very common law, that *Quilibet potest renunciare juri pro se introducto*. And maxims being the foundations of the common law, when they are once declared by the Judges, are held equal in point of authority and force, to acts of Parliament.— *Wood's Inst.* 6. The maxim that *Quilibet potest, &c.* extends even to cases where the life of the renouncer is concerned; the accessory by renouncing his right not to be tried before the conviction of the principal, may put himself upon his trial, and be hanged for it, 2 *Inst.* 501, 183. If the rule of renunciation extends thus far, it will hardly be contended that a man may not renounce some lesser advantage, such as the having of actual notice of the State being about to proceed to judgment against him.— But if this point be established, yet the question recoils— Have the receivers of public monies in this State agreed to renounce this privilege? To prove that they have, we have nothing more to do than to refer to the several acts of the Legislature for the better security of the revenue, 1784, *Rev. Laws*, c. 219. The Legislature directed judgments to be taken against delinquents by the Treasurer, in the name of the Governor, and declared that such judgments should be as valid as if the usual processes of law had been observed; the same in effect is repeated

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in 1787, *Rev. Laws. c. 269*. Now surely every officer who ^{Apr. 1794.} hath received his appointment since the 22d Oct. 1784, must be deemed to have taken it under the condition prescribed by these laws, and must in the very act of accepting the office, have consented, that in case of delinquency he would be subject to the operation of these laws; and is he not then as much bound as in the case of the judgment before mentioned? And I would remark, that these acts of 1784 and 1787, were so far from being viewed as unconstitutional by the Judiciary at first, that no scruple was ever entertained with respect to them, from the time of passing the act of 1784, until some time in the year 1788, but in this interval, judgments for the public were uniformly entered as the act directs, without actual notice to the Defendant. The records of this Court will verify the assertion, and the gentleman concerned for the State at that time can certify the same thing. [Mr. Moore was this gentleman, who was then present.] In 1788 a judgment was moved for, and the Court for the first time enquired, if the Defendant had been served with notice of the motion, and being answered in the negative, refused to give judgment. This determination was followed by a practice of giving notice, productive of enormous expence to the State—in order to prevent this expence for the future, and to leave no doubt in the mind of the Court with respect to the will of the Legislature upon this subject, they have unequivocally expressed it in the most pointed terms in their act of the last Session. Since the year 1784, there have been nine Assemblies of this State, the most of them have approved, some have amended this part of the revenue laws, and none have ever thought proper to repeal it. Would so many Assemblies, each of whom has done something upon the revenue business, have suffered those clauses to have remained unrepealed, had they believed them to be unconstitutional? Are these legislative bodies, charged and entrusted by their countrymen with their most important concerns, to be all regarded as men who either could not discover the unconstitutionality of a law, or were willing to countenance it? What interest have they in the continuance of an unconstitutional act more than the rest of their fellow citizens? Had the clauses been repugnant to the Constitution, they would undoubtedly have repealed them. The Legislature, though frequently blamed, are undoubtedly in general entitled to this commendation.

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Apr. 1794.  tion, that they seek the good of their country ; with men elected as they are, and for such a period, it can hardly be otherwise. In doubtful cases, the *argumentum ab inconvenienti* is of weight, and I conceive it may be properly introduced on the present occasion ; if the inconvenience of declaring this act to be unconstitutional be considerable, I presume this consideration will not be entirely overlooked by the Court. It was to avoid great public inconvenience that this act was passed. The expence of sending a messenger to all parts of the State, to give notice to delinquents, cost the State annually, not less than one thousand pounds ; and besides this, the parties well knowing it to be the duty of the Treasurer to take judgment after the first day of October in each year, either go out of the neighborhood, or conceal themselves about the time when the messenger is expected, so that after travelling a great distance, he frequently returns without seeing any of them, but he must still be recompensed for his services out of the public coffers. Sometimes he is fortunate enough to serve the notice upon one of several parties to a contract, and immediately some of the family are sent off to give notice to the others that the State messenger is about ; the consequence of which is that he cannot see the others : and thus he returns, having served one only, who perhaps of himself is not able to satisfy the demand. Frequently the County Courts take seventeen, or eighteen, or twenty securities, in order to indemnify themselves. The messenger must serve all these with notices ; to serve notice upon some of them only will not do ; if they are to be charged jointly, they must all be proceeded against ; and most frequently, for the reason just mentioned, it is improper to proceed against any one of them alone. The public debtors also frequently move away into other States, so that notice cannot be served upon them ; and if they have left any property which might be attached, the Treasurer, or his messenger, knows not where it is ; nor do they generally receive any intelligence of the danger of the public debt, till private creditors have swept away the whole property. All these evils, so detrimental to the public, and which the Legislature have manifested so much anxiety at different times to remove, will still be continued if the Court should adhere to its opinion of yesterday : and moreover, by such a decision, the Legislature will be utterly deprived of every power competent to its re-

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medy. It will be in vain for them to pass any act similar to the present, or to adopt any other mode but that of the old one, which has prevailed since the year 1788. At this time there are but a few hundred pounds in the Treasury, and the situation of public affairs renders it probable, that the Legislature may be convened before the day of its usual meeting—how are they to be supported? Should the public emergencies require the advancement of any considerable sum, which is not improbable, how is it to be obtained if the public judgments are not now taken? Or how is the Treasury to be supplied for the expences of the next meeting of the Assembly? I do not urge the latter arguments as properly possessing any such force as should have an influence in the decisions of a constitutional question, but only as reasons why we should carefully examine the question now before us, before we proceed to reject this act entirely. While we are considering the permanent and remote consequences of such a decision, the immediate and transient one should not entirely be overlooked, especially as it may put a stop to the affairs of government for some time, at this critical period, when the approach of war is universally expected. It has been said, amongst other objections to the clause now in question, that this is a retrospective law.—Does any part of our Constitution prohibit the passing a retrospective law? It certainly does not. The objection is grounded upon the 24th section of our Bill of Rights, which prohibits the passing of an *ex post facto* law. This prohibition is essential to freedom and the safety of individuals. This is a declaration that no power whatsoever shall be entrusted with the arbitrary disposal of the lives of our citizens. If the whole people should become prejudiced against a fellow-citizen, he is not to fall a sacrifice to popular caprice, or resentment. The representatives of the people shall not condemn him by any act of attainder, nor yet by declaring any former act of his to be now capitally criminal, or indeed more criminal, than it was at the time of its commission. Examples of popular phrensy exhibited in the ancient republics against some of the people's best friends, pointed to the propriety of this regulation; and this clause, I admit, is in restraint of legislative power in this particular—this indeed, prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but it leaves the Legislature free to pass

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Apr. 1794. all others, and without such a power no Government could exist for any considerable length of time, without experiencing great mischiefs. The exercise of such a power hath been found frequently necessary here since the Revolution, and divers retrospective acts, which the Legislature have passed, have been carried into execution and sanctioned by the Judiciary. See *Iredell's Rev.* 276 *Sec.* 24. 289, 318 *Sec.* 100. 386 *Sec.* 4. 424, 454, 463, 487, 489 *Sec.* 5. 573 *Sec.* 6, 7, 9, 10, 11, 16. The fact is, the affairs of Government will sometimes, nay often, require the exercise of this power. These instances may serve to shew the necessity of it. And it is not like an *ex post facto* retrospective law any way incompatible with the safety of a free people. The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore they have been careful to word the 24th section so as not to exclude the power of passing a retrospective law, not falling within the description of an *ex post facto* law—the Convention meant to leave it with the Legislature to pass such laws when the public convenience required it. I will not stir this point any farther, but conclude with expressing my hope that the Court will suffer us to take judgment.

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Judge WILLIAMS still adhered to his opinion of yesterday, giving nearly the same reasons he then gave.

At Halifax Court a few days after, the Attorney-General again moved the Court, consisting of Judge ASHE and Judge MACAY, and stated to them the arguments which had been used at Hillsborough; after hearing him the Court took time to advise for a few days: when the matter being moved again, Judge ASHE gave the opinion of the Court, saying he and Judge MACAY had conferred together—that for himself he had had very considerable doubts, but that Judge MACAY was very clear in his opinion that the judgments might be taken, and had given such strong reasons, that his (Judge ASHE's) objections were vanquished, and therefore that the Attorney-General might proceed—but that yet he did not very well like it.—So the judgments were taken.

NOTE.—Vide *Bank of Newbern v. Taylor*, 1 *Car. Law Rep.* 246, *S. C.* 2 *Murph.* 266.

Quinton v. Courtney.

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A common inn-keeper is liable for any loss which his guest may sustain in his property, except it be by the agency of a servant or companion of the guest himself, or when the guest is admitted upon terms when the inn is full. The possession of money gives the property of it as to any disposition which the possessor may make of it.

Case. Courtney was a tavern-keeper, and Quinton a traveller, who had saddle-bags in which were two hundred and eighteen dollars; upon alighting at the inn, he gave the bags to a servant of the tavern-keeper, but did not inform either the servant or the tavern-keeper that money was in the bags: these bags were placed in the bar-room, and were afterwards found on the lot, cut open, and the money gone. The declaration was in these words, to-wit:

NORTH-CAROLINA, } ss. April Term, 1793.
HILLSBOROUGH DISTRICT.

David Quinton complains of William Courtney, jr. in custody, &c. for that whereas according to the laws in this State, ordinary-keepers who keep ordinaries to lodge travellers therein who abide in the same, are bound to keep their goods and chattels being within these ordinaries, day and night, without diminution or loss, so that no loss or damage might happen to any such traveller or travellers, by reason of the defect of due and proper care by such ordinary-keepers or their servants in these ordinaries; and the said David, on the thirtieth day of January, in the year of our Lord 1793, in the County of Orange, in the district of Hillsborough, being lodged in the ordinary of the said William, had a pair of leather saddle-bags, in which were contained the sum of two hundred and eighteen Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, in that ordinary, and delivered the same saddle-bags and money to the said William, then and there to be safely kept; nevertheless the said William, knowing the said bags and money to be within his said ordinary, he the said William, on the same day and year first aforesaid, in the county and district aforesaid, did so negligently keep the said bags and money, that the said bags and money for want of safe-keeping thereof, by the said William and his servants, were lost, stolen and carried away from and out of the said ordinary; whereby the said David hath totally lost and become deprived from thence hitherto of the said bags and money, and of the whole use, profit, benefit and value thereof; and the said William hath not delivered to the said David the said bags and money, although the said William, on the fourteenth day of January, in the year of our Lord 1793, in the county aforesaid, was thereto requested, but hitherto hath and still doth refuse so to do, or to make him any satisfaction for the same: whereby the said David saith he is injured and endamaged to the value of pounds, and therefore he brings this suit, &c.

And whereas also the said David afterwards, to-wit. on the same day and year aforesaid, in the county and district aforesaid, being lodged in the dwelling house of the said William for a certain time, therefore to be paid to the said William, had one other pair of leather saddle-bags in which were contained other two hundred and eighteen

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Apr 1794. Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, within the same dwelling-house then and there being, and delivered the same to the said William, then and there to be safely kept for a certain time, received, to-wit, the sum of to be paid by the said David when the said William for the safe keeping thereof; nevertheless the said William, well knowing the premises, on the same day and year last aforesaid, in the county and district aforesaid, so negligently kept the said bags and money that the said bags and money, for want of such due care as aforesaid, were lost from and out of the said dwelling-house and possession of him the said William; whereby the said David hath totally lost and been defrauded of the said bags and money, and of the whole use, profit, value and benefit thereof; and the said William hath not delivered to the said David the said bags and money, although the said William on the fourteenth of January, in the year of our Lord 1793, in the county aforesaid, was thereto required, but hitherto hath refused, and still doth refuse so to do or to make any satisfaction for the same; whereby the said David saith he is injured and endamaged to the value of pounds, and therefore he brings this suit, &c.

And whereas also the said William afterwards, to-wit, on the aforesaid thirteenth day of January, in the year of our Lord 1793, in the county and district aforesaid, had undertaken safely and securely to keep in his custody, one other pair of leather saddle-bags, containing within the same the sum of two hundred and eighteen pieces of silver, coined money, commonly called Spanish milled dollars, of the value of one hundred and nine pounds of the current money of this State, being the bags and money of the said David, and to restore and re-deliver the same to the said David, whenever thereafter the said David should request him so to do, and for that purpose had received the said bags and money into his custody; the same William, his servants and agents afterwards, to-wit, on the same day and year last aforesaid, in the county and district aforesaid, the aforesaid bags and money so negligently and carelessly kept for want of due care of the aforesaid William, his servants and agents, the aforesaid bags and money then and there were stolen and carried away by some person unknown, from and out of the custody and keeping of the aforesaid William; and by reason thereof the aforesaid David the said bags and money, and the whole value, profit and benefit thereof, hath totally lost and been deprived of from thence hitherto; and the said William hath not restored or re-delivered the said bags and money to the said David, although the said William afterwards, to-wit, on the fourteenth day of January, in the year aforesaid, in the county and district aforesaid, by the said David was thereto required, but hitherto hath refused and still doth refuse so to do, or to make any satisfaction for the same, whereby the said David saith he is injured and endamaged to the value of pounds, and therefore he hath brought this suit, &c.

And the general issue was pleaded.

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Haywood, for the Plaintiff, insisted that ordinary-keepers were liable for the loss of goods of their guests committed to their care, unless the loss happens by the default of the guest himself. Inns were instituted for the benefit of travellers, that they might know where to go when travelling amongst strangers, without the dan-

ger of being robbed or defrauded of their effects ; and to say that the inn-keeper should not be liable for the loss of his guest's goods, would in effect destroy one of the principal ends of the institution of inns : and if it should be required to prove fraud or neglect upon the inn-keeper, before a guest could recover for the loss of his effects, this would destroy the utility of the institution in a great measure ; for frequently a stranger would not have it in his power to prove the circumstance—there is no inconvenience on the other hand comparable to this. The inn-keeper has nothing to do but to be careful—if he takes sufficient care, in general the goods will not be lost. The same answer may be given to the objection that the guest did not inform him of the contents of the bags—if he takes sufficient care, a thing of great value will no sooner be lost than a thing of small value ; and he ought to use this care in respect to all his guests, and all the effects they have with them, be the value great or small ; and therefore there is no necessity that he should be informed of the contents or value of the things confided to his care, and he cited 8 Rep. 33.—*Bac. Ab.* 182.—*Buller* 73, of edit. 1778.—*Cro. Jac.* 224. Apr. 1794.

Mr. Moore, for the Defendant, insisted in general that he could not be made liable but by means of his neglect. He cited *Coggs v. Bernard*, and many other authorities ; and he argued that the laws of England are not in force here, any further than the circumstances of the country make them necessary ; that these kinds of frauds which the laws of England were so careful to guard against, are not frequently practised here, and that therefore there is no necessity for the adoption of this hard law.

But *per WILLIAMS* (the only Judge on this circuit,) the law is as laid down in 8 R. 33—*Coley's* case, and the inn-keeper is liable for the goods lost, unless when the guest is robbed by a companion of his own : and in some few other cases mentioned in *Coley's* case, and in 5 *Bac. Ab.* 183, as where the guest is informed that the house is full, but the traveller insists upon staying, and says he will shift. And in order to support the action, it is sufficient for the Plaintiff to prove that the Defendant kept a common ordinary, that he was a guest, that the goods were brought to the inn, and were in the care of the Defendant, and were lost.

The Plaintiff under this charge had a verdict for one hundred and nine pounds, and judgment.

Apr. 1794. *NOTE*.—In this case, it appeared the Plaintiff had received this money of a Mr. O'Brien, of Tarbrough, for the purpose of purchasing certificates, which he covenanted in writing to deliver to O'Brien, or to return him the money; and it was insisted upon by Mr. Moore, that the money in this case was the property of O'Brien, and that Quinton only had it as his agent or servant; and that therefore the injury, if any, had been done to O'Brien and not to Quinton; and that O'Brien ought to have brought the action. But *e contra*, it was insisted, that strictly speaking, there is no such thing as property in money, or that if there was, the possession always gave the property to the possessor, and that an action which affirms property in the Plaintiff, could not be brought for it. *L. Ex. 262—Co. Litt. 286, b.—Salk. 284.*

Et per WILLIAMS, whoever has the possession of money, has the property of it: he may use it, and dispose of it as he pleases, without, and even against the consent and directions of him who entrusted him with it; and whoever receives the money from the trustee, though he knows it was entrusted to him for a different purpose, cannot be compelled to restore it, and the agent who abuses his trust in this respect, is only liable to damage by means of his contract.

NOTE.—Upon the possession of money giving the property, see *Clary v. Allison*, *post* 111.

State v. Joyce.

This was an indictment against the Sheriff of Rockingham for a misdemeanor in making a false return to an execution. It appeared in evidence, that the execution against one Nathaniel Williams, for levying a certain sum to satisfy Robinson Mumford, the Plaintiff, was put into his hands to be executed in due time; that he levied on property more than sufficient to satisfy the debt and costs, and appointed a day of sale, at which time there was but one bidder; and he believing, as having been so advised, that a sale could not legally be made, unless there were two bidders at least, returned upon the execution, that he had not sold for want of bidders. For this he was indicted, and now upon the trial, it was ruled clearly by Judge WILLIAMS, that one bidder at a Sheriff's sale is sufficient; saying if it was not so, no execution could ever be satisfied where the Defendant could procure a friend to attend and bid more than the property was worth at the first bid.—He was convicted and fined.

NOTE.—Vide *State v. Johnston*, *post* 293.

HALIFAX, APRIL TERM, 1794.

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Den on dem. of Blake Baker v. Webb.

Per MACAY, Judge.—The statute 5th George 2d, ch. 7, provides for the sale of land for debts, and the making them liable for all just debts in the hands of the heir, but does not alter the distinction between real and personal estate; real descends to the heirs, personal goes to the executors; the lands in hands of the heirs cannot be affected by a judgment against the executors, no more than the personal estate in the hands of the executors, can be affected by a judgment against the heirs. But per ASKE, Judge.—The statute meant to make lands liable to the payment of debts; and as to the payment of debts, are to be proceeded against as personal chattels. They descend to the heir chargeable with all such debts as may be recovered against the executors. WILLIAMS, Judge, on a previous case expressed an opinion similar to MACAY's.

If a deed be lost and its former existence proved, a copy, and if no copy, parol evidence may be given of its contents.

This was an action of trespass in ejectment, wherein the Plaintiff deduced his title as follows: This land was granted the 2d day of April, 1741, by the Earl Granville to Benjamin M'Kinnie; by him the 17th October, 1745, to William Kinchen; by him the 19th October, 1746, to David Hopper; by him the 12th September, 1747, to one Carter; the 3d September, 1760, it was conveyed by one Hays to Dewey, which recites a deed from Carter to Hays; by Dewey to Stuart, the 14th February, 1765; by Stuart to Joseph Long, the 20th July, 1768; and by Long to Blake Baker, the elder, the 16th December, 1768; which Blake Baker, the elder, was the father of the lessor of the Plaintiff, to whom the Plaintiff is heir at law; and the said Blake Baker the elder, was possessed, and died possessed in 1769. It was farther proven on the part of the Plaintiff, that Carter was in possession for seven years and upwards, and also that after his possession, the said Hays was in possession for a great length of time before he sold to Dewey, and used the land by getting timber off it: that Dewey was possessed two or three years, and that Long was possessed for some time; and that during the time of Hay's possession, Carter frequently declared that he had conveyed it to Hays. The Defendant on his part set up a title as follows: That one James M'Neil obtained a judgment for debt and costs, against the executors of Blake Baker, the elder, and took out execution thereon, tested in April, 1772; which execution commanded the Sheriff, that he should levy of the goods and chattels, lands and tenements in the hands of the executors, &c.

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Apr. 1794. And that by virtue thereof the Sheriff sold the lands in question, and executed a deed for the same, bearing date the 22d February, 1773, to Joseph Montfort, who by his will devised that his executors should sell; who sold accordingly to one Wilburn, who sold to J. Webb, who died leaving the Defendant his heir at law. The judgment was obtained in April, 1772, and two pleas had been pleaded by the executors, to-wit, *plene administravit* and *non assumpsit*, and the jury gave their verdict upon the other plea only, and there was a suggestion on record that there were lands, &c. The deed to Montfort, when produced, described the land thus—"Known by the name of Hays, formerly given by James Carter to James Hays."

(45) *Haywood*, for the Plaintiff.—It is a rule of law well established, that in ejectment, the great question always is, who hath the *jus possessionis*. It is this alone in the action of ejectment, that can entitle the Plaintiff to recover; and by whatever means it can be shewn that the *jus possessionis* is lost, by the same means you destroy the Plaintiff's right to recover. It is also a rule as well established, that wherever he who had the right of possession, hath lost it, he who hath the possession hath gained it, and may make title thereby. It operates not only negatively as a bar to the Plaintiff, but also positively by transferring the right of possession to him who hath maintained the possession. 1 *Burr. Rep.* 119.—*Runn.* 112, 14, 15, 105.—*Salk.* 421, 685.—*L. Ray.* 741. *L. Eject.* 71.—2 *Bl. Com.* 196, 197.—*Bull.* 102, 103. In the present case, we have acquired this right of possession three ways—First, by length of possession, namely Hays' possession, Dewey's possession, Long's and Baker's possession, altogether making a much greater length of possession than the statute requires; which when it begins once to run, cannot be suspended or impeded by any *ex post facto* circumstance, till it completes the bar intended by the act. Secondly, here is a regular chain of conveyances from the original patentee to Blake Baker, the elder, except as to the conveyance from Carter to Hays; which if it ever did exist, and is now lost, we may prove the contents of—and this is done by the recital of the Sheriff's deed to Montfort, under which the present Defendant now claims. The rule as to this point is, that though in general a deed reciting another deed, is no evidence of the recited deed; yet if the re-

citing deed be that by which either Plaintiff or Defendant claims title, it shall be evidence as against him of the reality of the recited deed. *Gilb. L. Evid.* 98. Thirdly, we have acquired the *jus possessionis* by a descent cast—Blake Baker, the elder, was possessed at the time of his death, and the land descended to his heir at law, the lessor of the Plaintiff. This circumstance, supposing Carter had the right of possession until that time would have tolled his entry. *Gilb. Ten.* 18, 19, 33, 36, 37.—*3 Bl. Com.* 176 to 179.—*2 Bl. Com.* 198.—*Co. Litt.* 266. *Gil.* 20.—*3 Bl. Com.* 188.—*Lit. f.* 385.—*Co. Litt.* 256. And by whatever means Carter's right of possession became tolled, by the same means the present Plaintiff, upon whom the land descended, became entitled to it; and therefore in respect to the title of the Plaintiff to the possession of the land in question, previous to these proceedings by means whereof it is pretended the Defendant hath obtained title, we may venture to conclude that the Plaintiff had the right of possession until and at the time of the sale made by the Sheriff in the year 1773, and that he now hath that right of possession, and is entitled to recover in this ejectment, unless the Defendant's title, as proven in evidence, be valid in law, and sufficient to supersede the Plaintiff's.

As to which we beg leave to premise, that lands upon the death of the ancestor, immediately descend upon and become vested in the heir, except only in the case of a devise to some other person, or of a judgment and execution issued in the lifetime of the ancestor. *Co. Lit.* 184, *b.* 6 *Rep.* 79, *a.* 10 *Rep.* 50, *b.* 51. Even in the case where lands are made chargeable by will with the payment of debts, the descent to the heir is not broken, but they descend upon him notwithstanding. *Co. Lit.* 236, *a.* 265, *b.* *Office Ex.* 295. *Godolph.* 211, 372, 376, 184, 199, 201. 6 *Mod.* 111. 2 *Mod. Cas.* 271. *Corwp.* 468. 1 *Atk.* 421. This we mention merely to shew how the common law stood previous to the act of Geo. II. which will be observed upon by and by more at large; and to prove that by the rules of common law as it was previous to that act, and as we insist it now is, these lands had descended upon Blake Baker, the lessor of the Plaintiff, and were to all intents and purposes his property previous to the time of M'Neil's judgment and execution; and then it will follow of necessary consequence, and from the very words of the writ of execution by virtue of

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Apr. 1794. which it is pretended the Sheriff sold these lands, that he had no authority for selling imparted to him by the writ. It recites a recovery of monies against the executors of Blake Baker, deceased, and commands the Sheriff to levy them of the goods and chattels, lands and tenements of Blake Baker, deceased, in the hands of his executors. This cannot extend so far as to authorise the Sheriff to sell lands that never were in the hands of the executor, and to the possession whereof the executor had no pretensions; and in all cases where the law entrusts any man, and more especially an officer concerned in the administration of justice, with a power or authority, it requires that authority to be precisely and literally followed, and no discretion is left to him of extending that authority, lest under the colour of acting according to the spirit of his commission, he might do some act of injustice or oppression. *L. Ray* 713. *Co. Litt.* 49, b. 52, a. 258, a. 2 *Bac. Ab.* 352. *Co. Litt.* 113, 265, b. *Salk.* 563. 2 *Ab.* 519. The plain inference, resulting from which rule is, that the Sheriff having taken and sold lands in the hands of the heir, when he had not any authority given to him by the writ of execution to sell his lands, but only lands in the hands of the executor, such sale is exactly in the same situation. We suppose it will hardly be contended such a sale could be supported.—

(47) But quitting this objection for a moment, let us consider the title of the Defendant in another point of view. The lands in the present case, descended to the heir, have been taken from him and sold by a judgment obtained against the executors; and although it would be sufficient to say, that the law of this or of any other country can never be so absurd as to establish, that upon a judgment against one man no way interested in preventing that judgment, the property of another should be taken to satisfy it, without any opportunity given of defending himself. Yet as it is to be contended for on the other side, that in this country the lands of heirs are liable to be sold for the debts of their ancestors, upon a judgment obtained against the executors only of their ancestors—it will become necessary to enquire what the common law directed in case of the death of an indebted ancestor, and whether the common law upon this head hath been in any respect altered. For if it shall be found that the common law required notice to the heir, and an opportunity to defend himself, before it would permit the lands de-

scended to him to be charged, this being so consonant to the dictates of natural justice, must impose a necessity upon the Defendant of shewing some express law, or invincible implication of law, supported by strong reasons of policy, whereby it hath been abrogated. So strict was the common law, that no judgment should pass against a man unheard—that no instance can be imagined where property was to be affected by legal proceedings, that it did not require full notice to be given of the proceedings intended against him, the design of them, and a day to be appointed for him to appear and make his objections against them; and this is required even in cases where the person that the Defendant represented in point of interest, had already made a deed—for it was possible that since these proceedings the representative might have obtained a release, or have some other matter to shew, which in point of law and reason would be sufficient for his discharge: and where a possibility of this kind existed, the common law deemed it unjust to condemn without hearing the party. Thus in cases of a judgment obtained in the lifetime of the ancestor, a recognizance, statute merchant, or statute staple, which in England affect lands from the time of their being rendered or acknowledged, though the lands are liable thereto and chargeable into whose hands soever they may come, and in like manner in case of a devise for the payment of debts. See 1 *Williams*, 391. 2 *Mod. Cas.* 171. *Cowp.* 468. 1 *Atk.* 421. 3 *Williams* 92. 2 *Eq. Cas. Ab.* 500, 502. Yet in all these and the like cases, where it is possible the heir may have a sufficient cause to shew to prevent the execution, or whereby having notice he may do an act that may prevent the execution or payment of the money due, or the like, the common law is strict in requiring a *sci. fa.* to the end the party may have a day given him to make his defence, or to do that other act which may discharge his property from execution. He here cited *Lilly's Ent.* 384, 391.—*Cro. Car.* 296, 295.—*Cro. Jac.* 186.—*Cro. El.* 896.—*Nels. Ab.* 925.—2 *Keb.* 621, *pl.* 12.—*Fonb.* 658.—*Dyer* 271, *pl.* 25.—81 *pl.* 62.—3 *Rep.* 15.—5 *Mod.* 88.—6 *Mod.* 134.—*L. Ray.* 854.—4 *Bac. Ab.* 418.—*Salk.* 598, 601. So careful is the common law in this respect, that in the case of *terre-tenants*, who have come into the possession of lands chargeable by judgment, it requires they also must have notice before the Plaintiff proceeds to execution. *L. Ray.* 590, 1048, 1255, 1036,

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Apr. 1794. 854.—*Salk.* 40, 679, 680, 276.—6 *Mod.* 199, 226, 256.—*Lilly's Ent.* 398.—1 *Mod. Cas.* 113.—2 *Cro.* 186.—3 *Mod.* 119, 274.—2 *Cro.* 506.—*Cro. El.* 740.—*Salk.* 601, 598.—*Cro. Car.* 215, 228.—*Cro. El.* 396. If it requires this in favour of a man who acquires the possession chargeable with a judgment already rendered against him, how much more will it require it in the case of an heir who hath by descent lands not yet affected by any judgment? This rule of the common law extends to all cases whatsoever. Even where personal property only is to be affected, it holds place—if it is meant to be affected in the hands of one, not a party to the first judgment, and who by possibility may have a defence to make. *Salk.* 320. *L. Ray.* 245.—2 *Doug.* 636.—2 *Inst.* 471, 395.—3 *Bl. Com.* 344. And although it be now questioned by the gentleman for the Defendant, whether the *sci. fa.* be necessary since the act of George II, to charge lands in the hands of the heir, yet this question hath been actually before stirred here, and determined in the affirmative—for amongst the records of the late Superior Court for this district, in the year 1771, there is an entry in these words:—"October Term, 1771. *Bride v. Lathberry.*—Execution. Motion to set aside the execution. The Chief-Justice pronounced the opinion of the Court to be, that the execution be set aside, and that restitution be awarded. The Chief-Justice alone being on the bench, and declaring the foregoing to be the opinion of himself and Justice HENDERSON, and that the latter yesterday, out of Court, in the presence and with the consent of Mr. Justice MOORE, requested the Chief-Justice to deliver the said judgment, as the judgment of the Court. Motion for a *sci. fa.* against the terre-tenant granted." This entry, short as it is, proves the decision of this very point heretofore; and as it seems to have been often argued and well considered by the Judges at that time, it deserves at least some respect; and since the revolution, there have been trials in our Courts in which the opinions of the Judge have been conformable to this opinion in the case of *Lathberry*—I mean the decided opinion Judge WILLIAMS gave in the case of *Baker and Long*, as to one parcel of the land sold upon a judgment against the executors, and in the case of *Baker and Ashe* tried in this Court. Now, if in the case of an executor or administrator, where judgment hath been regularly obtained against his testator or intestate, the law re-

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quires notice to issue to him before it will permit him to be charged, because there is a possibility of his having something to allege in his defence, surely such a caution is much more necessary where lands are to be affected in the hands of the heir, upon a judgment obtained against an executor, in the case where the *sci. fa.* is to issue against the executor or administrator—his testator, or intestate was at the time of the judgment the principal, and indeed the only person who was interested in defeating and preventing the entering up of such judgment—his property was to be subject to it—his person was liable to it—he best knew every defence that could be made, having been personally concerned in originating the contract or cause of action upon which the judgment was obtained; yet because the executor may have by possibility obtained a release, or may not have sufficient property of the deceased, and so may be in danger to be subjected for want of proper pleading *de bonis propriis*, he must have notice. In the case of the executor and heir, it is most generally the interest of the executor to throw the burthen of the debts upon the land of the heir. He is most generally a person beneficially concerned in point of interest in the personal estate, which if he can save at the expense of the real property, he and the other legatees become so much gainers; and the case now before the Court exhibits an example of the great facility with which an executor might ruin the heir, if the heir was not to be made a party before his land could be sold, if the executor was so minded. In this case, the executor pleaded *plene administravit* and *non assumpsit*, but only the latter issue was submitted to the jury, the former being confessed by the Plaintiff McNeil. If such a confession be sufficient evidence of the personal assets being exhausted, so as to enable the creditor without more ceremony to lay hold of the land, every executor by procuring a confession of the plea of *plene administravit*, by the creditor, whose interest it would most generally be, for the sake of having a speedy recovery, to accommodate the executor with such a confession, would have it in his power to charge the real property with all the debts of the testator; and thus the heir be stripped of his freehold, though there might be in possession of the executor personal property to a much greater amount than would satisfy all the debts; it might, for ought we know, have been the case in the present instance. Why

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Apr. 1794. did not the creditor and executor submit to the jury to enquire of the plea of *plene administravit*, as well as that of *non assumpsit*? It is evident there was some understanding between them; but all we contend for is, that such a combination is possible, and that the effects might be very prejudicial, if not ruinous, to the heir; and that a rule from which so many evils flow, and so much injustice springs, cannot be founded in law. It places the lands of the heir completely in the power of the executor, whose interest it is to burthen the land in exoneration of the personal estate. It is *committere agnum lupo*, and to deprive the heir of his freehold untried and unheard, when perhaps he is able to shew, if he had an opportunity, that the personal assets were not exhausted, or collusion between the creditor and executor in demanding and allowing, or in respect of the quantum thereof. The executor may frequently be exposed to the temptation of suffering judgments that might be prevented by a proper defence. There are circumstances which would render such a conduct profitable, not only to the creditor, but to himself. Shall not the heir be allowed to defend himself against such attempts? Shall his freehold, so much respected by the law, be taken from him at the will and pleasure of the executor, or by his neglect and carelessness? Surely no person can be more improperly trusted with the heir's interest than the executor, who in so many instances has an interest so directly opposed to that of the heir. But without reasoning about the policy or propriety of the thing, as it is certain that the common law required notice to the heir, let us now demand by what statute, act or other law, this privilege, so essential to justice, has been taken from him. There is no express law for this purpose—but it will be urged, that this alteration is operated by implication and construction of the act of 5 Geo. II. ch. 7, which enacts, “That from and after the 29th day of September, in the year 1732, the houses, lands, negroes and other hereditaments and real estates, situate or being in any of the said plantations, belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due

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by bond or other specialty ; and shall be subject to the Apr. 1794.
like remedies, proceedings and process in any Court of Law or Equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estate, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

If the alteration contended for in respect of notice to the heir, is not to be inferred from this act, it has never been affected at all, and the common law remains as it was—then for want of notice to the lessor of the Plaintiff in the present case, either by *sci. fa.* original action, or some other process, the sale of his lands, and the proceedings that are supposed to prop it, are wholly void as to him.

In order to get at the true meaning of this act, and by that means to discover whether it has really intended to take from the heir, this privilege of being previously called upon to defend himself before his lands could be seized—it will be proper to consider what was the occasion of introducing the act, and what the mischiefs it meant to remedy ; for if there were mischiefs, and it remedies them without the aid of the construction that the other side will contend for, we apprehend there can be no reason for extending it further than will reach these mischiefs, and more especially as such a construction is against the principles of natural justice, and against that rule of reason and the common law, which at all former periods hath most carefully been adhered to as the only sure means of obtaining justice. In the times when the feudal system prevailed, lands could not be sold, lest an improper tenant should be substituted ; and where a debt was recovered, there lay no other process for the creditor but a *fi. fa.* or *lev. fa.* 3 Rep. 13. Thus the law continued until the 13th Edward I. when the Parliament, finding how beneficial it was to that country to extend credit, by making creditors as secure as possible of their debts, passed two acts, making lands liable for the satisfaction of debts—the one in the 13th Edw. I. *ch.* 18, giving the writ of *elegit* ; the other in the same year, *ch.* 11, giving the statute merchant, &c. 2 Inst. 395. By the *elegit* the creditor might take the one half of the lands

Apr. 1794. where there was no personal estate, to hold, until out of the profits of an appraised yearly value, his debt should be satisfied. In the case of the statute merchant, the whole land was to be holden till such time, as according to an appraised yearly value, the debt should be made. A sale in either case was not allowed. And in respect to the debt of an ancestor, if he died before any judgment recovered against him, the heir was only liable to such debts as were due by the obligation of the ancestor, and in which the heir was expressly bound: as to all specialty debts in which he was not named, and all debts due by simple contract, where no judgment had been obtained against the ancestor in his lifetime, the heir was not chargeable with them. 2 *Bl. Com.* 377, 378, 244.—1 *P. Wil.* 777.—2 *Nels.* 66, 924.—*Vern.* 180.—3 *Levintz.* 189.—*Plow.* 440. Thus stood the law at the time of the first settlement of this country. The inapplicability of it here, and its unfitness for the circumstances of this country, soon became evident. The greater part of the property of this country consisted, though in fertile, yet in uncleared lands, not of very great value, and yielding no annual profit. As the acquisition of a tract of land was within the compass of every man's achievement, every man chose to employ his labour in the clearing and cultivating his own land rather than another's, which when cleared and improved, and rendered fit for tillage, would advance only the interest of the owner, and tend very little to his own: hence resulted the incompetency and inutility of the writ of *elegit*. Experience soon evinced that few or none would consent to hold lands by such a tenure as was offered by the writ; hence real property gave no credit to its owner—it could not in practice be made answerable for his debts. This was one of the inconveniences the act meant to remedy, and to that end it has made lands liable to be seized, extended, sold or disposed of, in like manner as personal estates, in any of the said plantations respectively, are seized, extended, sold or disposed of, for the satisfaction of debts. By this branch of the act, lands which before were not in reality liable to the satisfaction of debts, may now be exposed to sale, and this inconvenience is completely redressed. Another of the inconveniences resulting from the law as it stood before the passing of that

act, was, that lands in the hands of the heir, were not Apr. 1794.
 liable to any but specialty debts, made obligatory on him
 by express words : this inconvenience is also completely
 remedied by the act—it ordains for the future, that all
 real estates shall be liable to, and chargeable with, all
 just debts, duties and demands, of what nature or kind
 soever, owing by any such person to his Majesty, or any
 of his subjects, and shall and may be assets for the satis-
 faction thereof, in like manner as real estates are by the
 law of England liable to the satisfaction of debts due by
 bond or other specialty—this is a most copious provision
 against the latter mischief. By this branch, lands in the
 hands of an heir, are subjected to sale for all kinds of
 debts. These two branches of the act are all the opera-
 tive parts of it, and are manifestly aimed against the two
 evils before mentioned : it contemplated the removal of
 these and of these only. Before the passing of this act
 lands could not be sold for the payment of debts, and the
 heir was not liable to the simple contract, or other debts
 of the ancestor in which he was not named : since the
 passing of this act they are liable to be sold, and in the
 hands of the heir are liable to all debts justly owing from
 the ancestor. By the removal of these inconveniences
 the purposes of the act are fully effected, and we contend
 there is no propriety in extending it to any other case,
 which probably the Legislature had not in view, as that
 would be to make, not to construe, the act. It will be
 urged, that by the words, “ Shall be subject to the like
 remedies and proceedings, in any Court of law or equi-
 ty, in any of the said plantations respectively, for seiz-
 ing, extending, selling or disposing of any such houses,
 lands, negroes, or other hereditaments and real estate,
 towards the satisfaction of such debts, duties and de-
 mands, and in like manner as personal estates in any of
 the said plantations respectively, are extended, sold or
 disposed of, for the satisfaction of debts,” the Parliament
 intended, as to all purposes of execution of judgments, to
 have lands considered as personal property ; and of
 course that it is immaterial whether the executor had
 personal assets sufficient or not, as the creditor had his
 option to take the real or personal first, at his pleasure ;
 and that the real estate, as to this purpose being to be
 considered as personal estate, is properly in the hands of
 the executor, although as to all persons but creditors, it
 is to be considered as real estate descending to the heir

Apr. 1794. as before the passing of the act, and consequently that there was no necessity for any other person than the executor to be made a party to the judgment by force whereof the lands were sold. This is the doctrine that will be attempted to be established for the Defendant—but by the law of England, up to the time of passing the act of *Geo. II.* and of course by the law of this country up to the same time, the personal estate hath always been considered as the proper fund for the payment of debts, even in cases where lands or real estate have been made chargeable by will or judgment to the payment of debts. Yet so great hath been the regard which the law had for freehold property, that it would never suffer it to be touched but where it became manifest the personal estate was exhausted. 2 *Inst.* 395. 4 *Bac. Ab.* 419. *Cunning. verb assets.* 2 *E. C. Ab.* 493. s. 5. 494. s. 8. 496. s. 13. 500, s. 30, 31. 502, s. 38, 39. 2 *Ch. Cas.* 84. 1 *Vern.* 36. 2 *Vent.* 349. 1 *E. C. Ab.* 270, s. 10. This rule is not any relick of the ancient fendal system. It is founded in the soundest policy, equally applicable to the condition of this country as to that of England, and accordingly has been cherished and supported here, both before and since we emerged from regal government. That property which is deemed the most sacred, and is the best secured by law, becomes more than any other the object of attention, because it is the most permanent, and it is good policy to make that property most the object of attention, which the most effectually attaches its proprietor to the country he lives in, and real property possesses this quality more than any other. An industrious man, who by his labour has collected wherewithal to purchase him a little property, naturally fixes his attention upon that which in all probability will continue the longest with his posterity, and which the law has rendered the most difficult to be taken from him—a freehold becomes his object, as well for the reasons before mentioned, as because the Constitution of the country has annexed to it certain privileges that advance him in the rank of citizenship; and as the freehold, when acquired, is incapable of being moved away like personal property when danger threatens or the State has occasion to call for personal or pecuniary aid, he is always ready to be called on, and to supply the emergencies of the commonwealth; when at the same time the holder of

(55) personal property, apprised of the services which the

State needs, hath withdrawn both himself and his effects Apr. 1794.
 from the country, and possibly may throw them into the
 scale of the enemy. The more freeholders there are,
 therefore, the greater is the public strength and respect-
 ability—and the method the law has taken to encrease
 their number, is by placing freehold property as far out
 of the reach of creditors as was consistent with that
 other maxim of justice and good policy, that all just
 debts ought to be paid when the debtor has any property
 wherewith to pay them. These we think are sufficient
 reasons for the preference the law has given real over
 personal property; and notwithstanding the construction
 contended for, I believe it has always been understood
 since the passing of this act, that the rule of law is
 so. In the case now before us, and in several other ca-
 ses that have been before this Court, in which the present
 Plaintiff was concerned, there was the plea of *plene ad-*
ministravit pleaded and confessed; from whence it may
 be inferred to have been the opinion of these times that
 without such plea the lands could not be made liable,
 and in the same cases it is observable there is a sugges-
 tion entered on the record, that there are lands, intima-
 ting that the plea of *plene administravit*, confessed or
 found, was the only circumstance that could warrant
 such suggestion; and that in these times the lands were
 not considered as assets in the hands of executors for the
 payment of debts; for had they been assets in the hands
 of the executor, the suggestion of lands, where it was
 confessed that the executor had legally disposed of all
 his assets, would have been absurd: and since the Revo-
 lution, this same rule of law has been carefully attended
 to and preserved. *N. C. Laws*, 303, s. 29. 530. 531.
 These instances serve to evince the constant opinion
 which has been entertained of the existence and the pro-
 priety of the rule, that real property cannot be affected
 where there is personal estate to answer the demand,
 both before and since the passing of the act of *Geo. II.*
 and constant opinion and experience, we are told, are
 good interpreters of an act of Parliament; and to all
 those instances I would add the weight of the solemn ad-
 judication in 1771, before stated.

These examples all prove that the construction the De-
 fendant would put upon this part of the act of *Geo. II.*
 blending real with personal property, and placing it in
 the same degree of liability with personal property for

Apr. 1794. the satisfaction of debts, militates both with the policy of our laws in general, and with the true spirit of the act in question in particular, and proves also that we should look out for some other meaning more consonant to both; and the true meaning seems to be, that the real estate, like the personal, shall be liable to be sold by the writ of *fi. fa.* and to be conveyed to the vendee forever as personal property may, it respects only the interest which may be conveyed to the purchaser, and in that respect only places real estate upon the same footing as personal. Before the passing of the act of *Geo. II.* tenant by *degit* could only hold the land until by the reception of the yearly profits he had made the debt, now the vendee shall be entitled to hold them forever, in like manner as if he had purchased personal property, and in like manner as if personal property, instead of real, had been seized, extended, sold or disposed of, for the satisfaction of the debt, and he had become the purchaser. Surely it cannot be inferred from these words, that the ancient well established rule of preferring the real to personal property, is broken down, and together with it this other rule, that every man ought to have the defence of his own property, and warning given him to defend, before it shall be taken from him, when they are so capable of another meaning, and such an one too without which the law would not be perfect, nor could be made to accomplish its end. Is it not enough that lands are made liable to sale, when before they could only be extended?—Must we go further, and imply what the law has not said, that they may be taken from the heir and sold without making him a party? For this is the direct consequence of saying they shall be assets for the payment of debts in the hands of the executor. Why say the executor shall have it in his power to affect the real estate by confession of judgment, or not defending the claim, or defending it but faintly, or by colluding with the creditor, when this law has not said it? Why say the creditor may make the land first liable if he will, when this act expresses no such sanction; and when the ancient rule, framed with wisdom and grounded upon the soundest reasons, has manifestly and undeniably drawn a plain line of distinction between the real and personal estate of the debtor, making the former an auxiliary fund, only when the other fails? Why break down so many material boundaries, when the act has said nothing about

them, and when it is fully satisfied by the meaning we contend for, and when the act has clearly expressed its meaning with respect to the real estate, to be that it shall be liable to simple contract and other debts, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty? How are they liable to be affected in England by bond or specialty debt? Are they liable to be extended in the hands of the heir by a judgment against the heir, before they can be seized? In case of a judgment against the ancestor, must there not be a *sci. fa.* against the heir; if no judgment, must there not be an action of debt against the heir? Can lands in England be affected, whilst there is personal estate sufficient to pay the debt? Could this act have more definitively expressed its meaning, than by referring to this well known criterion, in like manner as real estates in England are liable to the satisfaction of debts by bond or other specialty? How can it be pretended after this precise declaration of their meaning, that the Parliament intended the lands of this country to be considered not as real estates, but as personal assets for the satisfaction of debts? Can such a meaning be imposed against the very words of the act, and in the face of so many ancient rules of law? Surely I shall be warranted in concluding it cannot. But let it be granted the Parliament really meant that lands should be considered as personal estate in the hands of the executor; what will that avail the Defendants in the present case? The consequence will be, that these lands, as to the purpose of making satisfaction for debts, went as other personal property into the hands of the executor, from and immediately upon the death of the testator, and were assets as the personal estate of the testator was in his hands from that time; then they were assets in the hands of the executor, when the Plaintiff *M'Neil* confessed the plea of *plene administravit*, and the confession of that plea amounted to this, that the executor had paid in a legal course of administration, to the value of the assets which had come to his hands, and this being a confession on record, barred him from ever resorting to any of the testator's property, which at the time of the confession of that plea, had come to the executor's hands; and thus the lands in question, supposing them to have been personal assets, were forever exonerated from the Plaintiff's demand. 3 Rep. 134. Off. Exe. 185, 188.

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Apr. 1794. 190, 191: *Bull.* 169. So that, if it be conceded to the Defendant, that these lands were, what in truth they were not, personal estate; yet they were evidently illegally sold. Let us add one observation here, and we will quit this part of the case—had the act of *Geo. II.* made lands as personal estate for the payment of debts, then the executor would have had some controul over them, for the purpose of keeping them liable; he would have had some power to dispose of them, when it became evident the personal estate was deficient—but has it ever been known, that the executor has taken possession of the lands upon the death of the testator; or that he has had it in his power to hinder the heir from selling, when he wished to sell? Has a sale of lands by an executor for payment of debts, without power given him in the will of the deceased, ever been held, or supposed to be valid? Has it not always been thought, since the passing of this act, as well as before, that the executor will be liable to the action of the heir, if he should enter upon the lands for any other purpose than that of making an inventory? And if the executor cannot sell directly, to enable himself to discharge the debts of the deceased, lest he might prejudice the heir, shall he be enabled indirectly by suffering a judgment against himself, to do the same thing? Would not this be to make the law defeat its own sanctions? To say to the executor you shall not be entrusted with a power to sell the lands, lest you might injure the heir, but you may suffer a judgment against you, and cause the land to be sold that way. Had the act intended to consider land as personal property, all those powers would have flown to the executor as water from its fountain; and some of the able Lawyers and Judges, who were cotemporary with the making of that act, and were the best expounders of it, would have recognized these powers, and have caused them to be exercised and practised—yet no instance can be shewn of any such practice, from the time of passing that act to the present moment; and certainly the total silence of those who have gone before us on these topics, is a great evidence that such is not the meaning of the act—wherefore, as to the Defendant's title, both because the Sheriff had no authority to sell the land in question by the terms of his precept, and because had there been such a precept, it was issued without any judgment against the heir to warrant it; or to make the best of it, by such judg-

ment as in respect of him was totally void. we humbly Apr. 1794.
submit whether the sale made by the Sheriff is of any validity whatsoever, to do away the title of the Plaintiff.

It will be urged for the Defendant in case of extremity, that these proceedings at worst are only erroneous, and will remain in force till reversed by a writ of error—to which we say, if they are erroneous only, and not absolutely void, as we contend they are, yet the adjudication, and the award of execution, being the acts of the Superior Court, could not at the time they took place, nor can they now, be reversed by the Superior Court in a writ of error—for the same Court that hath rendered an erroneous judgment, is never entrusted with the power of correcting it. To lodge such a power with the Court who hath committed the error, with an expectation that that Court would correct it, would be absurd: and beside, who is to grant the writ of error? There is no other Court in this country but the Superior Court who can grant it—so that the Superior Court must direct a writ to itself, therein giving a commission to itself, to correct an error in judgment which that Court had formerly committed. This cannot be seriously insisted on: it is a doctrine too tender to bear the light. The true rule is, where a Superior Court hath committed an error in a matter of fact, the same Court may correct the error; not where the error is the act of the Court in a matter of law. In England they have a writ, or commission, directed to them from the Chancery for this purpose—in this country I do not know how they will proceed, perhaps by filing an assignment of errors, and noticing the adverse party to answer them. 1 *Roll.* 746, 747, *pl.* 12. 2 *Bac. Ab.* 215, 190. *F. N. B.* 50, 51. *Lill. Ent.* 490. It is also a rule of law, that where a party who is injured by an erroneous judgment, is so situated that he cannot have relief by a writ of error, or other means; that then he may be relieved by plea, entry, ejectment, &c. or other means best suited to his case. 2 *Mo.* 308, 219. 11 *Rep.* 44. *b.* 2 *Bac. Ab.* 229. 6 *Rep.* 14. *a.* 9 *Rep.* 119. *b.* 3 *Bac. Ab.* 153. 8 *Rep.* 76. *b.* *Cro. El.* 489. And accordingly there are many cases to be found in the books, where a man may take advantage of an erroneous proceeding in assize. 2 *Bac. Ab.* 347. *Roll. Ab.* 304, 305. *Cro. Jac.* 85. *pl.* 10. 3 *Bac.* 153. *Roll. Ab.* 140. *F. N. B.* 648. *Roll. Ab.* 140, *pl.* 6. And if in an assize, certainly also in an ejectment, both be-

Apr. 1794. ing actions of a similar nature, that is to say, both being possessory actions. 1 *Burr.* 110, 111. And indeed there are express authorities that such error may be taken advantage of, upon evidence in ejectment. 2 *Bac. Ab.* 369. in a note 1 *Lev.* 160. *Carth.* 453. So that we apprehend, notwithstanding this objection, for these reasons and authorities, it will be thought we have adopted the proper method of avoiding these illegal proceedings in the present case, and we hope to have the opinion of the Court in our favour.

(60) I cannot give any thing like a complete representation of *Col. Davie's* argument, some of the most striking parts of it I noted at the time, and those only I am able to give—though his argument was a very ingenious one, and contained much law, and cited many authorities.

Davie. for the Defendant—As to the title of the present Plaintiff, as attempted to be deduced from the original patentee, there is a chasm—the deed from *Carter* to *Hays* is wanting. I take the rule of evidence to be this—when a deed once actually existed, and has been destroyed by fire or the like, (*Bull.* 254,) then a copy, and for want of a copy, parol evidence of the contents may be given; but in the present case no one is introduced to prove, he ever saw a deed from *Carter* to *Hays*; no one pretends to swear it was lost, and consequently no proof is made of its having ever actually existed. In the case of *Few* and *Alves* at Hillsborough, we produced the probate of the deed on the minutes of the County Court; even the sworn copy of the Register's book is not evidence. As to the recital of the deed from *Hays* to *Dewey*, that is no evidence of the recited deed; we were no parties to it: and as to the recital of the deed from the Sheriff to *Montfort*, that deed is under the seal of the Sheriff only, and he who hath not sealed a deed, cannot be estopped by it. This deed contains only the words of one party, neither is the confession of *Carter*, that he had conveyed to *Hays*, of any avail. He might have leased for a term of years, or have conveyed some estate of less dignity than a fee. He might possibly have given it verbally, without executing any deed at all. His saying he had given the land to *Hays*, is too slight and too uncertain to be received as proof of the existence of a deed. With respect to the Plaintiff's title, by possession, the second section of the act of limitations respects the Plaintiff's title, the third section regards the title of Defend-

ant—by the second section the Plaintiff must have colour of title and possession; but *Hays* never had any colour of title, and if he had possession for seven years or more, for want of a colour of title to accompany it, he acquired no title thereby: but in fact he had no such possession as the law takes notice of, so as to ripen into title; that must be an actual possession, *Quasi positus pedis*, an actual setting down upon the land. It must be such a possession as will make a notoriety in the country, and inform him who has title that the land is adversely claimed: otherwise a man might lose his title by a secret using of the land, which he might not know of till it was too late—cutting timber off another's land, at different times, through a course of seven years, will not do—it must be an actual continued possession. *Derwey* had never any possession of the land, he lived upon another tract adjoining; which other tract was purchased of another person; and although *Hays's* tract, as it is called, might adjoin it, yet his possession of the other tract, could make no notoriety of his claiming *Hays's* tract adversely to the claims of all other persons. He might have purchased it so secretly from *Hays*, that *Carter* might not have known it in seven years—and shall the mere circumstance of his continuing the possession of another tract adjoining that, oust *Carter* of his title?—*Derwey* conveyed both tracts, by one deed, to *Stewart*, in 1765. *Stewart* had not the actual possession of *Hays's* tract, but had a quarter upon that part of the two tracts united, which *Derwey* before had possession of; and I suppose the possession of this part, was the possession of the whole land contained in that deed, and by consequence an actual possession of *Hays's* tract: yet from the time of *Derwey's* conveyance to *Stewart*, to the time of the death of *Blake Baker*, the elder, there is a space of about four years only, so that he had not acquired the *jus possessionis* in his lifetime.

With respect to the other means by which the Plaintiff attempts to make a title in himself, namely, a descent of the lands upon him by the death and seizen of *Blake Baker*, the elder, which he insists, tells the entry of him who had the right of entry, whoever he was—this is a doctrine founded in the feudal system, and is therefore not applicable to the circumstances of this country. *Gillb. on Ten.* 18, says, “The notions of the law do make this title to him, that there may be a person in being to do the

Apr. 1794.  feudal duties, to fill the possession, and to answer the actions of all persons whatsoever; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person whatever, till such possession be evicted by judgment; which being also the act of law, may destroy the heir's title." Were this doctrine adopted here, it would be replete with mischief. There is no instance of any writ of right having been ever sustained in this country, or of any other, of the ancient common law actions for the recovery of lands; whence it may be inferred they would not be sustained here, should they be brought. But by this doctrine if a man had privately settled upon another's land, and before the proprietor had discovered it, the trespasser had died in possession of the land, the proprietor could not bring an ejectment; which is the only action here used, he having lost the *jus possessionis* by the descent cast, and of course he would be deprived of any recovery forever. Such a method of acquiring and losing a title, is so unfit for the situation and circumstances of this country, and in practice would be attended with so many mischiefs, that I apprehend it cannot be taken to be, or ever to have been the law here, whatever it may have been in England. It is too repugnant to the principles of common justice. The Plaintiff therefore upon either of the three grounds he has taken, must fail.— But supposing him to have made out a good title, that title hath been legally transferred by a Sheriff's sale to the Defendant; this leads me to a consideration of the act of *Geo. II.* At the common law, lands were not liable to execution for debt, being obliged to answer the feudal duties to the Lord, and a new tenant could not be forced upon him without his consent in the alienation.— 2 *Ba. Ab.* 328, 329. And the person of a debtor could not be charged in execution, because he was to be left at liberty, to serve the King in his wars. 3 *Rep.* 13. There were no other writs of execution for the creditor, but the *fi. fa.* and *lev. fa.* by the former, the goods and chattels of the debtor only could be taken in execution; in the latter, the Sheriff was commanded *quod de terris et catalis ipsius levare facias*, &c. whereby the Sheriff may collect the debts out of the profits of the land, as the corn or grass growing thereon, or out of the rents payable to

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the creditor; but he could not by either of these writs meddle with the lands themselves. 2 *Ba. Ab.* 351. But these writs were common law writs, and affected chattels only. *Gilb. on Exe.* 4. The *fi. fa.* never was considered otherwise than as a writ against the goods and chattels of the debtor; in England the land could not be sold, because the debtor or tenant had not the property, but the lord of whom the feud was holden. It was not till the year 1285, when the *elegit* was first introduced by the 13th *Edw. I. ch.* 18, that lands could be affected with the tenant's debts at all. *Gilb. on Exe.* 32.— But they were not allowed to be sold by this writ, they were to be appraised according to their yearly value, and delivered to the creditor to hold, till out of the yearly profits he should make the debt. In England the property of all the lands in the kingdom, resides in some superior lord, and that is one reason why the land of a subject cannot be sold to satisfy his debts. But that is not the case in this country; the feudal system never did prevail here; every man hath been always held to be the absolute lord and proprietor of his land, having the entire dominion in himself. These things I mentioned to shew the gradual changes which have been made in the law in respect of executions, & how it became proper and convenient in this country to sell lands by the writ of *fi. fa.* when such a proceeding was impossible to be effected in England. In the year 1732, and previous to that time, the evils existed that have been enumerated on the other side, namely, lands could not be sold for the payment of debts, and the extending them here was not any remedy to the creditor, owing to the infantine and unimproved state of the country, and lands were not liable after the death of an ancestor, to any of his simple contract debts, nor to those due by specialty in which the heir was not specially named: and it is true, that these mischiefs were meant to be remedied by the act of *Geo. II.* But these were not the only evils it meant to provide against, there were others which are to be attended to in forming a construction upon this act, which the counsel on the other side has not mentioned, and which notwithstanding the passing of this act, must still remain unremedied, if such construction is not put on it as we contend for by the law as it stood at the time of passing the act of *Geo. II.* If the heir aliened before action brought, the debt due

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Apr. 1794. from the ancestor could not be recovered against him. This indeed had been remedied in England by the 3 and 4 *W. and M. ch.* 14. But that statute not being in force here, having been passed after the settlement of this country, the same inconvenience continued to exist here as had existed in England previous to the act of *W. and M.* and it continued also after the act of *Geo. II.* unless the words, "and shall be subject to the like remedies, proceedings and process, in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of, any such houses, lands, negroes and other hereditaments, and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations, are seized, extended, sold or disposed of, for the satisfaction of debts," shall be so construed as to place real property as to executions, and the satisfaction of debts, upon the same footing as personal estate. If in these respects it is so considered, then the heir will not have it in his power to defeat the creditor by alienation; for the land will be as personal assets in the hands of the executor, till the debts of the ancestor and testator are paid, and the sale of the heir will be invalid; or the lands will be considered as assets in his hands liable to be affected by a judgment against the executor, and making the heir himself, liable to the value, in like manner as personal assets make the holder of them liable for the value, whether he dispose of them before or after action brought. The Legislature have expressly said, that as to the satisfaction of debts, lands shall be liable in like manner as personal estate, and may like them be sold; would not the court then go too far, should they say, that in many respects, lands shall not be liable as personal estate, but shall be proceeded against in a different way, and that still they shall be considered as so much in the nature of real property, that the heir by aliening before action brought, may discharge himself of the debt entirely? This would be to extend the operation of this act to part only of the mischiefs it meant to correct, by using general words, it undoubtedly intended to cut off all those evils I have mentioned, by the roots at once; and which indeed it will have effected completely, should the comprehensive terms used by the Legislature be suffered to retain their genuine and natural import; and it is to be

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remarked that by our construction, the process whereby ^{Apr. 1794.} the creditor is to come at his debt, is much shorter; the whole is done by making the whole property of the testator, a pledge as it were in the hands of the executor, for the satisfaction of his just debts: the creditor has nothing to do, but to substantiate his charge against the executor, and to receive payment; this comports with the preamble of the act, which is made for the purpose of extending the credit of the plantations, by putting it in the power of creditors, more easily to obtain recoveries and satisfaction of their debts. It is true indeed, the foregoing part of this act says that lands shall be assets, for the satisfaction of all just debts in like manner as real estates are by the law of England; but this is only descriptive of the debts to which lands shall be liable, not of the manner of proceeding against them; and is tantamount to saying, that the lands of Carolina shall be liable to all kinds of debts, as much as the lands of England are liable to specialty debts, that is to say, in other words, as well after the death of the ancestor as in his his lifetime; for in England they are liable to specialty debts in which the heir is named, after the ancestor's death; or more properly speaking, the heir is liable in respect of them. The law of England in the case of specialty debts, is referred to, it being well known, and precisely ascertained, how far lands are liable by that law to specialty debts, when in this former part of the act by reference to the law of England it is sufficiently ascertained, that the real estates of this country should be liable to all just debts, and that as well after as before the death of the ancestor: then lest doubts should be entertained by what kind of proceeding they should be affected, it directs that they shall be proceeded against in like manner as personal estates, or to be more explicit, that when judgment is against the ancestor, the same process shall cause them to be sold as causes the sale of his personal property, namely, the *fi. fa.* and so also after his death, that the same proceedings as are to affect the personal estate, shall affect them also; that is to say, a judgment and execution against the executors.— Besides the inconveniences already enumerated on the other side, there were also others at the time of passing the act of *Geo. II.* which though redressed in England by the act of 3 and 4 *W. and M.* had not been remedied in this country. If the debtor devised away his land from

Apr. 1794. the heir, the devisee was not liable to his debts; in the technical notions of the law, he acquired the land by purchase, not by descent, and this mischief remained after the act of *Geo. II.* If ours is not the proper construction to be put upon the act, but if, since the passing of that act lands are to be taken and proceeded against as personal estate, the devisee's power to alien will be restrained until the discharge of all the testator's just debts, as the lands of the deceased, so far as regards the satisfaction of all just debts, will be assets in the hands of the executor, and be bound by the judgment rendered against him: but as the act of *W. and M.* was never in force here, all those inconveniences are left unremedied by the act of *Geo. II.* and the creditor, until our act of Assembly, 1789, *Rev. c. 311. sec. 2.* might have been defeated of his debt by the alienation of the heir, or a devise of the lands; but all these hardships are at an end by the act of *Geo. II.* should it receive its proper construction, and be held to place the real estates of this country upon the same footing as personal estates with regard to the process for debts due by the owners; and then it will be found, that this act destroys all distinction between real and personal property, and no longer allows the real that preference it possessed before the act of *Geo. II.*—

(66) A preference as I have before shewn, founded in feudal principles, and retained in the code of English laws, in the struggles between the landed and commercial interests in that country, insisted upon, and maintained from time to time, as lands were gradually subjected to the satisfaction of debts; but in this country, where every man was the absolute proprietor of the land he held, and it was not for the interest of any party concerned in the passing of that act to insist upon that preference, it was therefore no longer regarded. The act was intended for the benefit of creditors, and to give them a hold on the real as well as the personal estate of the debtor, without any distinction between them; and it is for this purpose that the act so expressly provides, that the real shall be subject to the like process as the personal estate: the act designed that the creditor should arrive at his satisfaction out of the real estate, in the same manner and no otherwise, than if it was personal property; and accordingly after the passing of this act, the Judges conforming to the true spirit of it, adopted the writ of *fi. fa.* as

the proper execution to be issued under it. A writ cal-
 culated only for the sale of personal chattels, and always
 used at the common law as such. This is a circumstance
 that proves the contemporary exposition of this act to
 have been, that land was considered as chattel property,
 as far as related to the debts of its owner. Upon what
 other principle could it be supposed, this chattel writ would
 ever answer the purpose, if lands were still to be view-
 ed in the light of real property? Could a writ com-
 manding the Sheriff, that *de bonis et catallis debitoris*, he
 should make the debt, &c. empower him to sell the lands
 of the debtor, if by some law these lands were not to be
 considered as the *bona et catalla debitoris*. This writ has
 been constantly used, and no other, for the sale of lands,
 ever since the act of *Geo. II.* and in my opinion there
 cannot be a stronger proof than this, of the meaning which
 the latter clause of this act has been constantly deemed
 to have. Much has been said, and whole volumes of au-
 thorities read, to prove the necessity of a *sci. fa.* against
 the heir: we will not deny, but that before the act of
Geo. II. a *sci. fa.* was necessary, but that was a case ex-
 tremely different from this before the court, and is fully
 answered by stating the difference only between the
 nature of real estates in England and here, since the
 passing of the act of *Geo. II.* all the authorities cited, are
 of cases where the party against whom the original judg-
 ment or proceeding was, died since the judgment, so that
 there is no person left against whom to take out execution,
 who was party to the judgment; but the counsel for the
 plaintiff cannot shew one precedent, where the *sci. fa.* has
 ever been deemed necessary, the party against whom the
 judgment was, remaining the same, and in the same con-
 dition, without any circumstance to vary his case, as
 when the judgment was obtained. The party to be
 called in, must be the representative of the person against
 whom the judgment was; the *sci. fa.* is always founded
 upon a record, to which the person to be served with the
sci. fa. was a party, or privy. Our act of 1784, *Rev. c. 204* is
 the first instance where the heir could be called in by *sci. fa.*
 upon a judgment, after the death of the ancestor; and
 without the aid of that act, the *sci. fa.* grounded upon the
 record of a judgment against the executor, would never
 have lain against the heir, because to that record he was
 neither party nor privy. The *sci. fa.* is not a common

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Apr. 1794. Law writ; it was introduced by the statute of Westminster, the 2d. Car. 45, and lay only upon the foundation of a record, to which the defendant was party. It is very incorrect therefore to say, that the *sci. fa.* lay in the case now before the court, against the heir; where the act of *Geo. II.* provides no such process, and where it is apparent the statute of Westminster does not authorize the use of it in such a case as the present, where there is a complete defendant in being, and the circumstance of his case not altered, from what they were at the time of the judgment by the intervention of time or otherwise. And indeed, if the *sci. fa.* would lie in such a case before, what was the use of passing the act of 1784, *Rev. c. 204*? The great number of authorities read by the plaintiff's counsel are good law in England, but very inapplicable here, and can have no weight in the present cause. Here the *sci. fa.* is not necessary, nor could it be used upon the same principles as in England, I mean in this case of a judgment against the executor, to whom the heir is no representative; and when the executor himself is alive. 4 *Bac. Ab.* 411. Our Legislature hath been careful, to avoid the inconveniences attending the recovery of debts, which I have before pointed out, lest the act of *Geo. II.* might not be deemed sufficient to eradicate them, an act hath been passed for that purpose almost *verbatim* from the act of 3 and 4 *W. and M.* This proves how great these inconveniences were considered to be, and also that the act of *W. and M.* was not in force in this country. I must therefore conclude for the defendant, that the lands of the heir might have been sold upon a judgment against the executor, and that there was not any necessity for a *sci. fa.* to have issued against the heir, that indeed it could not have been used in the present case, and that the lands which are the subject of this controversy, were well sold by the Sheriff to Montfort, under whom the defendant claims.

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Counsel for the Plaintiff in reply—Though a deed be not destroyed by fire or water, but by other means, the party who wishes to use it may, by proving its existence formerly, and its contents, avail himself of it; and where he is not entitled to the custody of the deed, less proof will be required of its loss. Destruction by fire or water in the cases, cited, are put by way of examples only. *Bull.* 254. 2 *E. C. Abr.* title evidence. Here we have made such proof both of its existence and contents, as is proper to be submitted to a jury.

The recital in the Sheriff's deed is good, against a person claiming under the the deed. *La. Evid.* 100.—Apr. 1794.

Where a deed is accepted by a party named in the body of the deed, but who did not seal it, and where the indenture is made in the third person and accepted, it will estop as much as if the party had executed it. *Co. Litt.* 230, 231, 352.

The second section of the act of limitations was made to validate titles irregularly, though honestly obtained, before the passing of the act, and has long since had its effect. Indeed from the passing of the act, all such titles as are therein described, were confirmed by it. The third section was made to give title to a possession for seven years, and it operates at the same time both for the possessor and against the owner. It was made to quiet men's titles, and to prevent law suits after a great length of time when evidences and witnesses might be lost. It is this third section, and no other, in that act which can mature possession into title. It is a mistake to say, the second section has any operation of that kind. Possession adversely kept, and that known to the former owner, is surely a sufficient possession to make title. There, by the confession of *Carter* himself, *Hays* was in possession for himself, exclusive of any other person's claim or title.—This is notoriety enough to *Carter*, and he would not be allowed afterwards to disturb such possession by entry. The doctrine of tolling entries by a descent cast—this originating in feudal principles, is not supported solely by them, it is founded also, upon a principle of justice, namely, that he who could and would not attack the ancestor, who knew (it is presumable) how to defend himself, ought not to be suffered to impeach the heir, who is generally an infant, and who will require time to be informed of the true state of his title. It was not, because the tenant of lands in England had not the property of them, that they could be sold by *fi. fa.* it was for this reason, that an improper tenant should not be forced upon the Lord—a woman unfit for military duty—an enemy of the Lord—a monk, or man of religion, or otherwise unfit for duty—might be imposed upon him, and the military system, which first originated this law, be deranged: Indeed the law itself was continued afterwards for other reasons, when those of its introduction had ceased. Ever since the restoration of *Charles II.* until the time of our late revolution, the tenures of this country and of England

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Apr. 1794. were the same—both free and common socage; so that at the time of passing the act of *Geo. II.* the owner of land in England, was as much the absolute proprietor as the owner of land here. As to the additional inconveniences, which it is said the act intended to remedy, namely, alienation by the heir before action brought, and a devise by the debtor, the act of *Geo. II.* has very amply provided against them, by a means much more consistent with principles of justice, than the defendant seems to imagine: if we attend to the wording of that act, we shall find it adopted and enforced here—the act of 5 *Geo. II. ch. 7.* says: “The real estate of this country shall be assets for the satisfaction of all just debts, in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty:” then what was the law of England at the time this act speaks? Why, if an heir aliened before action brought, the act of 3 and 4 *W. and M.* said, he should be liable for the value; so he is here, since the passing of the act of *Geo. II.* for all just debts; in like manner, if a debtor devise away his lands from the heir at law, the law of England, *to-wit:* the 3 and 4 *W. and M.* says, such devise as to creditors shall be void, and that such creditor may maintain an action jointly against the heir and devisee, for the recovery of his debt: so since the passing of the act of *Geo. II.* which adopts the law of England with respect to the liability of the real estate, the lands of a debtor in this country, though devised away, make the devisee liable for all his just debts. By this means the ancient rules of law we contend for, are preserved—the heir or devisee is still to be sued, or a *sci. fa.* or some process, issued against him, his lands are not to be taken away by a proceeding to which he is not a party; and at the same time, the inconveniences suggested by the Defendant’s counsel completely removed. The act of *Geo. II.* by its reference to the law of England, demonstrates the intention of the Parliament to have been, that the heir or devisee should first have notice, by some kind of suit, and this plain and obvious meaning of the act, overturns the whole system of argumentation founded upon the supposed inconvenience, which the act must be made by construction to remove. It is true, all, or almost all the cases of *sci. fa.* which we have shewn, were cases where the Defendant was dead, and no person left who had been a party against whom execution could be taken out; but

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all those authorities shew the principle, that the heir cannot be affected but by process issued against himself.—

What we contend for is only this, that the heir's property cannot be taken away but by a proceeding to which he is a party. We are not anxious it should be by a *sci. fa.* or any other particular mode—we say we should have been called into court by some process or other, and have had an opportunity to defend our freehold; but it is a mistake to say, the statute of *Westminster the 2nd*, introduced the *sci. fa.* it was substituted by the statute to the original action, which at common law it was necessary to commence on a judgment that had been dormant for a year and a day. All the authorities on the subject of a *sci. fa.* against the heir, are proofs of this; for none of them are grounded upon the authority of the statute of *Westminster*, but upon the common law, and that maxim of universal justice that no man ought to be condemned unheard.

Our act of 1784, *Rev. c. 204* was indeed the first that expressly directed the *sci. fa.* against the heir upon a judgment against the executor; but the preamble of that act expresses the doubt that had been entertained respecting the proper method of arriving at a sale of the lands of a deceased debtor. It is evident the Legislature supposed the lands could not be sold by a judgment against the executor only, and if the act of *Geo. II.* had made lands liable to sale without any *sci. fa.* merely upon a judgment against the executor—why were those doubts entertained? Where was the necessity of this act? The same provision it makes, was already made by a much more speedy and short method, by the act of *Geo. II.*

It is argued that because after the act of *Geo. II.* lands were sold by a *fi. fa.* which at the common law was a chattel writ, therefore lands after the passing of this act, were deemed chattels, otherwise the *fi. fa.* could not have touched them—but was not an alteration made in this writ to accommodate it to the purpose of the act of *Geo. II.*? Have not the words “lands and tenements,” been added to the common law writ of *fi. fa.*? This makes a wide difference between the common law writ of *fi. fa.* and *fi. fa.* used in this country. If the common law chattel writ of *fi. fa.* as it is called, would have effected a sale of the land, for what purpose were the words “lands and tenements” added? It is clear, it was apprehended the lands could not be sold under the words of the old

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Apr. 1794 writ, "goods and chattels of the debtor;" and this seems to be one, amongst the many strong reasons there are, for rejecting the construction which this argument, drawn from the nature of the writ of *fi. fa.* is intended to support.

Judge *Macay*—The whole weight of this labored case, seems reducible to this question, what is the true construction of the *5th Geo. II. ch. 7.*? And I am of opinion this act meant to provide for two things, the sale of lands for debts, and the making them liable to all just debts in the hands of the heir: and I am of opinion, that since the act of *Geo. II.* the same distinctions between real and personal property is to be kept up as before—and that lands, upon the death of an ancestor, descend to the heir, and personal chattels go to the executor as before; and lands in the hands of an heir, are no more to be affected by an action or judgment against the executor, than the personal estate in the hands of an executor, are to be affected by a judgment against the heir: their interests are totally distinct and separate. As to the Plaintiff's title, if a deed be lost, and the existence of it be proven, a copy, or if no copy, parol evidence may be given of the contents: if these proofs be satisfactory, they are to be received. The jury have heard some evidence for both these purposes, it is for them to consider of the weight it deserves to have; if satisfactory to them they will find the Plaintiff's title complete.

Judge *Ashe*—I am of opinion the *5th Geo. II. ch. 7.* meant to make lands liable to the payment of debts, & so far as regards the payment of debts, to have them proceeded against as personal chattels; and that they descend to the heir chargeable with all such just debts as shall be recovered against the executor—hundreds of tracts of land have been sold since that act upon the supposition that the law was such.

The Plaintiff had a verdict and judgment.

(72) NOTE.—Upon a case circumstanced exactly as this, tried at Halifax three or four terms ago, between *Baker* and *Ashe*, Judge *Williams* delivered the same opinion, or to the like effect, as Judge *Macay* now gave. And the Plaintiff recovered upon the same grounds as the Plaintiff in this case now recovered. Judge *Macay* being then upon the bench, but not giving an express opinion himself—having now given it, whereby the opinion of a majority of the Judges upon this point being obtained, it is supposed it may now be received and cited as law—accordingly this case, as being of great importance, and affecting perhaps much real property in this country, has been reported here.

NOTE.—Vide *Act of 1714, Rev. ch. 226—1789, Rev. ch. 311—1791, Apr. 1794. Rev. ch. 352—1806, Rev. ch. 704.*—And see the cases of *Spaight v. Wade's heirs*, 2 *Murph.* 295, and *Tremble v Jones's heirs*, 3 *Murph.* 579, which are constructions upon the two first mentioned Acts.—The design of all these enactments is, that after it has been judicially ascertained that the personal representatives have no assets, or not sufficient to satisfy the Plaintiff's demand, the heir or devisee shall have notice by *sci. fa.* to come in and contest the fact of lands descended, or may make up a collateral issue with the personal representatives and have the question of assets again enquired into. The heirs or devisees, if they sell the land before action brought or process sued out against them, become personally liable for the value of the lands: but if the lands continue in the hands of the heirs or devisees, or are fraudulently sold, the lands themselves only are liable to the execution. The lands, if *bona fide* sold before the *sci. fa.* it seems would not be liable; and in such, the creditor must look to the personal responsibility of the heir or devisee.

Den on the demise of Robert Bell v. Green Hill.

Fraud is not barely to be suggested, but must be proved. A judgment by default upon a tobacco bond, is not final. A judgment (final) binds lands, from the time of its rendition, as to purchasers, from the Defendant, but not so as to defeat the title of one purchasing under the execution of a subsequent judgment. As between creditors, it is not the first judgment, but the first execution, that gives the preference.

This was an action of ejectment, upon the trial of which at this term, the following facts appeared in evidence, viz: In the month of February, in the year 1780, and for a long time preceding, *William Massey* was seised in fee, in the county of Franklin, of the premises in question; and in that month the Administrator of *Thomas Bell*, dec. brought suit in the County Court of Franklin for the recovery of a sum of money due from the said *William Massey* to the said *Thomas Bell* in his lifetime; and in the said term had a judgment by default; which was continued from term to term, till June term 1783: at which term they obtained a final judgment; but before the issuing of any writ of execution, in the month of August, 1783, the Defendant, *Massey*, obtained an injunction against the judgment and execution, which was dissolved on the 18th April, 1789; and afterwards a *renditioni exponas* was issued the 24th July 1789, upon which the Sheriff sold the land to the lessor of the Plaintiff, and executed a deed to him, dated the 5th February, 1790.—On the other side it appeared, that in June term, 1783, in the same County Court, one *Devany* brought suit against the same *William Massey*, upon a bond for five thousand pounds weight of tobacco, and had judgment by de-

Apr. 1794. fault; and in September term, 1783, he obtained a final judgment: whereupon execution issued, and on the 22nd June, 1784, the Sheriff sold to *Green Hill*, he having express notice, at the time of the purchase, of the judgment obtained by *Bell's* Administrators, and being warned by the Administrator not to purchase; and the Sheriff executed a deed to him, dated the 22nd of September, 1784. The Defendant also made title another way: on the 2nd of July, 1782, *William Massey* conveyed to his son *James Massey*, and he in the month of June, 1784, to *Hill*; and in June, 1784, the deed from *Massey* to his son was registered: but *Massey*, the father, continued in possession until after the sale to *Hill*, and then moved away—This *James Massey* was not a person of any substantial property at that time; sometimes he had, and sometimes he had not property; what he had was brought from foreign places, and it was frequently claimed and recovered by better owners. In September or October, 1784, he offered to buy land of one of the witnesses and offered *Hill's* bond in payment, upon which there was an indorsement of two hundred pounds paid to *William Massey*; and twelve months before that time, the witness said it was talked of that *William Massey* had sold to his son; and another witness said, that some time in 1784, *James Massey* drove beef from *Hill's*, and delivered them to the old man; and late in 1784, or in 1785, let him have a horse; and that in 1784, *James* had several negroes. The original deed from *William Massey* to *James* was not produced but the copy only—but one *Joel Parish*, whose name was subscribed as a witness, said he had frequently endeavoured to recollect whether he ever did attest such a deed, and he could not remember he ever did, or ever knew of such a conveyance.—This was the evidence on both sides.

Haywood for the Plaintiff—The deed from *William* to his son, was fraudulent. It appears from the amount of the judgment of *Bell's* Administrators, compared with the price of the land as it is stated in the Sheriff's deed, and even in that of *William Massey* to *James*, that he was indebted to the Administrators singly, in a much greater sum than his property was worth, and the contest between these parties arises from the circumstance of his insolvency. His property was not adequate to the discharge of both debts—one or other of them must lose his debt, owing to this circumstance. There are several

circumstances the law has deemed evidences of fraud, Apr. 1794. when attending the conveyances of an involved man.— Those who mean to cover their property, generally use every colouring of fairness their invention can discover; and the fraud of the parties can no otherwise be developed but by circumstances: positive proof is never obtainable. Amongst the circumstances the law deems evidences of fraud, there is none stronger, because none more suspicious, than that of the conveyance of an indebted father to his child. The law deems it fraudulent as against a creditor, unless the child can prove a valuable consideration actually paid. 2 *Nels.* 890. 1 *Mo.* 76. *Ambl.* 599.— In the present case, nothing was paid by *James* till the latter part of year 1784, when it seems some cattle were delivered, that came immediately from the defendant; who, before this delivery, had become a purchaser in June, 1784, both from the Sheriff and from *James*; but from 1782, in the month of July, the time the conveyance to *James* bears date, until late in the year 1784, no money was paid. Had this been a fair transaction, would not some steps have been taken in all this time to have procured payment? Can it be supposed the old man would have rested satisfied for upwards of two years, having made an absolute conveyance to his son, who was at best in slender circumstances, and as proven in evidence, of slight character, without payment, and even without any security for it? Is it not a circumstance of suspicion, that this deed was not registered till June, 1784, the very time *Hill* became the purchaser? Is it not suspicious, that the original is now to be produced, when it is evident *James Maosey* did not take it from the Register's office, having no use for it, *Hill* being the owner of the land at the time of registration, and ever after? Is it not a matter of some curiosity, that the witness cannot remember ever to have subscribed that deed, and that there is no vestige in his mind of any remembrance of such a deed? Another mark of fraud mentioned in *Twyne's* case, 3 *Rep.* 81, is, that the donor continued in possession and used them as his own, &c. Here the conveyance is said to have been made in July, 1782, yet the grantor remained in possession till the year 1784, in the latter part thereof; and the witnesses, who are all of the neighbourhood, tell us, they heard nothing of this conveyance, except *Mr. Norwood*, who says, he had heard the sale talked of twelve months before; *James* offered

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Apr. 1794. to buy his land in September or October, 1784, a period that will bring us back to September or October, 1783, when *Devany's* judgment was obtained, and when of course it became necessary to devise some method to get rid of *Bell's* judgment, obtained in the June preceding.— Another mark of fraud mentioned in *Twyne's* case is, if the conveyance be made pending the writ. Here *Bell's* Administrators had sued, their suit was depending & judgment by default, obtained in February, 1780, was continued till June, 1783; and in the interim, July, 1782, the deed appears to bear date—can a conveyance like this, immediately and directly tending to frustrate the suit of a creditor for a just debt, receive the sanction of a court of justice? Does it not appear plainly, that the contracting parties had this debt of *Bell's* Administrators in view, at the time the conveyance was made in July, 1782, if in fact it was executed at that time? Had the injunction been dissolved at any time before *Hill's* purchase, surely *Bell's* execution would have prevailed over such a conveyance; and the circumstance of *Hill's* becoming a purchaser, and making a payment to old *Massey*, cannot make that a valid transaction, which at the time of his purchase, and before, was totally void as to *Bell's* Administrators.— Here then we have almost every circumstance of fraud mentioned in *Twyne's* case, and several that are not mentioned in it—here is an indebted father conveying to his son, who pays no valuable consideration; which conveyance is made pending a writ against him, and in secret; the grantor continues in possession, and uses the premises as his own—to my apprehension, if *Twyne's* case is law, both according to the principles of that case, & the common sense of mankind, there cannot be a case of more apparent fraud than the present. I will now therefore dismiss this part of the case, without further consideration, little doubting but that that part of the Defendant's title, which rests upon this conveyance, will be deemed fraudulent and void.

As to the other part of his title, the facts are briefly these—After the judgment of *Bell's* Administrators, and while the writ of execution is suspended by injunction, *Devany's* judgment is obtained, and the land sold under it to the Defendant: afterwards the injunction is dissolved, execution upon the first judgment issues, the land is sold under that also, and the Plaintiff becomes the purchaser. Upon which statement I beg leave to ob-

serve, that in England, the *elegit* is the only execution Apr. 1794.
 that affected the lands of the debtor. It was introduced
 when the advantages of commerce began to be perceived,
 and the extension of credit became necessary, in the 13th
 of *Edw. I.* All that this statute says, is: "That when
 a debt shall be recovered or acknowledged in the king's
 court, or damages adjudged, it shall be hereafter in the
 election of him who sues for such debt or damages, to
 sue out a writ, that the Sheriff shall cause to be made of
 the lands and chattels of the debtor, or that the Sheriff
 shall deliver to him all the chattels of the debtor, except-
 ing oxen and beasts of the plough, and the half of his
 land until the debt shall be levied, by a reasonable ap-
 praisement and extent," &c. Not a word is said of
 binding the lands by *elegit*, from the time of the judg-
 ment; but as this was a remedial law, made for the be-
 nefit of creditors, it was proper to advance the remedy
 by construction as far as was consistent with the princi-
 ples of justice, and to make each species of property liable
 to the execution, as far back, for the benefit of creditors,
 as the nature of that property would admit. In the case
 of personal property it was already liable from the teste
 of the writ, and it might have been productive of injus-
 tice to have stretched the relation any further: it was
 going a good way in favour of the creditor, to say his
 execution should reach the goods in the hands of a *bona*
fide purchaser, who had acquired them after the teste of
 the writ of execution. These goods might not have been
 purchased in the neighbourhood of the Defendant's resi-
 dence, where the purchaser might have had notice of the
 Defendant's circumstances—they might have been re-
 moved to a distance, and sold in places where neither the
 Defendant nor his circumstances, were known. But as
 this was law at the time of passing the act, and as that
 was made manifestly for the benefit of creditors, the
 Judges concluded it was most proper to let that lien upon
 the personalty remain as it was—but with respect to the
 real estate, they thought this act should be extended as
 far as possible, without inconvenience, for the benefit of
 creditors. It was made for their benefit, and should
 receive a construction promotive of the views of the Le-
 gislature; and as lands could not be removed, and
 so were not liable to the inconveniencies attendant on
 personal property just now mentioned, the courts said,
 they should be bound as from the time of the judgment.

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Apr. 1794. It was in compliance with the views of the act to give it such a construction, and accordingly it hath prevailed ever since; and the *elegit*, formed agreeably to this construction, commands delivery to be made of a moiety of the lands the debtor had the day of the judgment rendered, or at any time since. *Cunning. verb. Elegit. 2 Inst. 395. 396. 7 Rep. 38. Co. Litt. 222. a. 50. 1 Rep. 99. b. Lill. Ent. 572, 575. 1 Morg. Pl. 348, 345. 342.— Hawk. Ab. Co. Litt. 157, 102. 2 Atk. 609, 440, 441.— 8 Rep. 171. Cro. Jac. 512.* By the law of England therefore, as received and used in this country till the time of passing the act of 5 *Geo. II. ch. 7.* which will be commented upon by and by, these lands would have been undoubtedly bound by the first judgment. But it may be said, the word *binding*, as applied to executions, means only a taking from the debtor a power to dispose of his effects until the debt is satisfied. This doubtless is a part of the meaning of that term, but is not the whole meaning of it when used in relation to lands to be affected by the execution: it means also that the first judgment creditor has the first right to satisfaction preferably to any other judgment creditor. *Vigilantibus non dormientibus jura subveniunt.* He who has taken the earliest measures to secure his debt, and has been at the trouble & expence to obtain his judgment, should not be excluded the benefit of it by another creditor who has substantiated his demand at a later period. We shall not cite authorities to prove, that the Defendant, after a judgment, cannot dispose of his lands himself. No part of our case requires it, and we presume besides no lawyer will deny it. But it is important in this part of our progress, to prove that the creditor acquires a lien upon the land by his judgment; and that the first lien is first entitled to satisfaction. This point is completely established by the following authorities. *Co. Litt. 287, b. or 289, b. 4 Rep. 66, b. Off. Exec. 138. Bull. 104, 105. Carth. 255. 1 Mo. 253. 3 Pic. 399. 2 Ba. Ab. 864, 341. 3 Ba. Ab. 26. 2 Ba. Ab. 433.* These cases are express, that if *A* obtains a judgment, and then *B*, and *B* has the land extended, that *A* may afterwards take out his execution, and extend the same lands, and evict the possession of *B*: and no other reason can be assigned for this, but that the first lien is by law entitled to the first satisfaction. Even in the case of personal chattels, which at the common law are bound from the teste of the writ, though

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there are some contradictory opinions to be found, the true rule is, that the vendee under an execution of a subsequent teste, was liable to be evicted of the possession, by a vendee under an execution of a prior teste: and it was to prevent this inconvenience of the common law, that the statute of frauds was made in England; which directs the goods to be bound from the delivery of the writ to the Sheriff, this being a matter of more notoriety than the teste of an execution, and better adapted to give publicity to the fact of the goods being bound. All the cases in the books, when properly considered, will be found to proceed upon a principle of tenderness to an innocent vendee, under an execution of a subsequent teste, not apprised of the former; but none of these cases go so far as to protect a vendee under an execution of a subsequent teste or delivery, knowing of another execution of a prior teste or delivery. 2 Term Rep. 731, 732. Apr. 1794.

I mention these things to shew the uniformity of the law in its adherence, in all cases, to this rule, that the first lien is to be first satisfied; and because they may be of some service to oppose the arguments to be made use of on the other side. [Judge Ashe—Mr. Attorney you had better answer the arguments of the counsel on the other side, after they are made, and not by anticipation.] It will be insisted on the other side, that the sale of lands, and of personal estate, are in all things upon the same footing; I hope I shall be excused thinking as I do, that it is of importance to prove, that this judgment of *Bell's Administrators*, had it taken place before the act of *Geo. II.* would have bound the land from the time of the judgment given; and that it would have been entitled to satisfaction preferably to any judgment afterwards rendered; and that an *elegit* upon it, would over-reach any *elegit* upon any subsequent judgment: it seems to me essential to establish these several points as incontestibly as possible, before we proceed to consider whether the law has been altered by the act of *Geo. II.* One other remark I would beg leave to add in this part of the argument, (I will be as short as possible) it is this—that notwithstanding the execution of a judgment is suspended by writ of error, certiorari, death of the Defendant, or other cause; yet the form of the *elegit*, issued after the removal of the obstacle, is never altered; and although such suspension may have continued for years, when the *elegit* issues, it is to take and deliver the moiety

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Apr. 1794. of the lands of the debtor, which he had at the time of the judgment rendered, or at any time since. Now if the suspension of the execution had been deemed in law to give a preference to an intermediate judgment creditor, who could procure the lands to be extended and delivered to him, during the suspension of the prior execution, the law would have provided an *elegit*, after such suspension, of another form: it would at least have been conditional as to the lands the debtor had at the time of the judgment. *Co. Litt.* 115. *b.* says: "That one of the best arguments or proofs in law, is drawn from the right entries and course of pleading, for the law itself speaketh by good pleading;" and therefore *Littleton* saith, "It is proved by pleading, as if pleading were *ipsius legis viva vox*." As therefore after such suspension the form of the *elegit* still continues the same, it is an evidence, that the law remains the same also; and that the writ of error, by its intervention, makes no alteration in the lien whatever. It is further demonstrated by this circumstance, that when a judgment is obtained against an ancestor, the heir is proceeded against by *sci. fa.* which treats him as terre-tenant not as heir. 3 *Rep.* 12, 13, &c. and no action of debt will lie upon the judgment against him as heir; and he must be proceeded against only as terre-tenant, for this reason—that the land is bound by the judgment, and is in *custodia legis*, for the benefit of the creditor, and does not descend to him as heir, but upon condition, till the debt be satisfied. All this is performed by the mere operation of the judgment itself, by its attaching upon the land the moment it is pronounced: whence it may be inferred, that if a suspension by writ of error, certiorari, and other suspending process at law, is incapable to give a preference; and that in the present case the lien of the Plaintiff's judgment during the continuance of the injunction, and after its dissolution, continued as unimpaired as it would have done had the injunction been a writ of error only: in which case it is evident (as the law was up to the time of the act of *Geo. II.*) the Plaintiff, after the determination thereof, would have been entitled to satisfaction out of the land, even though another subsequent judgment creditor, as *Devany* was in the present case, had caused it to be extended and delivered by an intermediate execution. Indeed it would be very preposterous, if the Defendant should have it in his power by procuring or

not procuring a writ of error or injunction, to give preference to, or postpone the first judgment creditor to a second, according to his whim or caprice: it would open a wide door to fraud, and in a great measure put all creditors in the power of a debtor who was not able to pay all—he might say if you will agree to allow me such and such advantages, you shall have the benefit of your judgment, otherwise you shall have nothing; I will procure a writ of error, or injunction, and in the interim confess judgment to another, or suffer him to obtain judgment for want of a defence, and to have his execution satisfied out of the property I have. Were the law so, it would speak in contradictions: your execution is entitled to preference, but the Defendant may defeat you of that preference if he pleases. Again, it would be in many instances to put it in the power of the officer, to give preference to whom he pleases. If in this case the Sheriff, after having notice of the lien of *Bell's* judgment, had desisted from selling to *Hill*, then *Bell's* execution would have had the preference, and would have been satisfied after the dissolution of the injunction; and the Sheriff would not have been punishable for not selling, for he might have returned the truth of the case, that the land was bound by a prior judgment: but if he proceeds to sell, according to the doctrine insisted on for the Defendant, the sale is good, and there is nothing left to satisfy the judgment of *Bell's* Administrators: and I do not know, nor do I believe the Sheriff can be made answerable to *Bell's* Administrators; because in the case of lands, he only sells such right as the Defendant hath, and the purchaser takes it with its circumstances; that is to say, in the present case, liable to such prior lien as *Bell's* Administrators had on it by means of their judgment: so either way the Sheriff is safe, and has it moreover in his power, according to what is insisted upon for Defendant, to give preference to the one or the other at his election. The grounds of such a conclusion cannot be solid. There is no rule of law better established than this, that the act of the Defendant, of law, or of the officer, shall never affect or diminish the right of a third person, the Plaintiff. 5 Rep. 87. 1 Rep. 102. a. 105. b. 106. b. So that it is clear, neither the act of the Defendant in procuring the injunction, nor of the law in permitting it to issue, nor of the Sheriff in selling the land to *Hill* when he did, could place the Plaintiffs, with respect to

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of the prior lien, and consequently of the wrong doing of the Sheriff? And this conclusion, in fact, is in opposition to many authorities—the statute of frauds in England altered the common law which gave a lien from the teste—that act gives it only from the delivery of the writ to the Sheriff. It is laid down in 2 *E.C. Ab* & in *L. Ray.* 252. that this act was made to assist a purchaser in market overt. It was thought hard, that a *bona fide* purchaser in market overt, should be liable to a seizure of the goods, only because there was an unknown execution, of a teste prior to the purchase; therefore the act makes the binding the goods to relate to the time of the delivery of the writ, not to the time of the teste of the writ, as at the common law; as to all other persons the common law remains; that is to say, as between creditor and debtor, and as between creditor and creditor, the *fi. fa.* binds from the teste of the writ; and in *Term Rep.* 731, 732, *Ashurst, Justice*, says, but the Legislature saw the inconvenience and hardship which would fall upon innocent purchasers, if the vendee under the second writ, were liable to be dispossessed of the goods which he had *bona fide* bought; and therefore they guard against it by the statute of frauds: this, says he, I understand was the sole object of the act. This is a plain declaration, that if the statute of frauds had not been passed, the vendee under the second *fi. fa.* by the rule of the common law, might have been dispossessed by the vendee under the first; this is conformable with the two sentences I have adverted to in the case of *Smallcomb* and *Buckingham*, as reported by *Salkeld*, though in direct opposition to the conclusion of that case. *Justice Ashurst* further says, the act of frauds was only intended to protect the possession of purchasers under an execution—how was this effected?—(82) Not by saying that a vendee under an execution of a subsequent lien, should hold against the vendee under an execution of a prior lien; but by removing the lien itself, to the time of delivery of the writ to the Sheriff, an act of some notoriety, that might serve to give notice to purchasers, who might search the Sheriff's office before they purchased; but as well since that act as before in England, a vendee under an execution of a subsequent lien, must give way to a vendee under an execution of a prior lien, even in the case of personal chattels. For proof of this position, I rely upon the cases last cited; all of which prove, that purchasers in market overt, and

Apr. 1794. under executions of the common law, were liable to be evicted by subsequent purchasers, under executions of a prior teste; and that the Parliament relieved them of this inconvenience in part, by saying the goods of a debtor should not be bound, but from the delivery of the writ; the consequence of which will be, that there will be fewer persons who purchase in the face of an execution of a prior lien since that act, than before; because the means of obtaining knowledge of this priority, is rendered more easy by the act, than it was by the common law: and let it be further remarked, upon the case of *Smallcomb and Buckingham*, that it was determined with much hesitation, and seeming uncertainty—In *Salkeld* it is subjoined, that the bearer of the *fi. fa.* said to the Sheriff, he was not in haste, so took out no warrant, nor left any fee; and this inclined the opinion of the court more strongly against him. This leaves it in doubt upon what principle the court decided, whether upon what they took to be the rule of law, independent of the fraud, or whether upon the circumstances of its being an attempt, on the part of the Plaintiff to protect the goods against the second execution; or whether they decided upon both these considerations jointly. I take the truth to be, the court proceeded upon the principle of the Plaintiff's attempting to cover the goods by means of his execution, and so prevent the other creditor from having any satisfaction at all, even out of the goods which would have remained unexhausted by his execution. This is a circumstance that undoubtedly ought, and by all the authorities would have postponed him. I infer this to have been the ground of the decision, not only because it is so intimated by *Salkeld*, but also because in a report of the same case, 5 *Mo.* 377. *Holt* is represented to say, it is fit the law should be settled—

(83) here was an honest sale, you put in the writ, and let it lie longer; then comes the other and brings the writ the same day, yet saith the party to the Sheriff, you may let it lie, it requires no haste, &c. This report plainly indicates the opinion of the court to have been founded in the neglect or fraud of the Plaintiff in the first execution. This case, therefore, can have but little, if any, weight as an authority in one, where the plaintiff in the execution of the first lien, has not been guilty of any fraud or neglect; and supposing the *fi. fa.* against lands, is now upon the same footing in all respects, as the *fi. fa.* against goods and chattels; yet it does not prove that the vendee

under the execution issued upon the second judgment, has Apr. 1794.
 preference to the vendee under the first. But the common law as established by the other cases, that the vendee under the execution of the first, will have the preference. *Vide Comb. 123. 4 Term Rep. 412.* where this point is established by the authority of *Holt* himself, and the opinion vindicated by the Judges of the King's Bench. This supposition however that the *fi. fa.* against lands, is in all respects like the *fi. fa.* against personals, though we have assumed it in argument for the purpose of shewing that the Defendant upon the strongest ground he can take must give way to the Plaintiff—is not by any means tenable, nor founded on any principle of law. Lands are still bound by the judgment as before the passing the act of *Geo. II.* and in the same manner, whether they be proceeded against by *elegit*, or *fi. fa.* under the act of *Geo. II.* The *13th Edwd. 1 c. 18.* that gave the *elegit*, because it was enacted for the benefit of creditors, and was a remedial act, was construed by way of advancing the remedy and furthering the security of creditors, so that the *elegit* subjected lands from the time of the judgment rendered; and surely a subsequent act, intending to benefit creditors in a still greater degree, ought to be construed by such rules as will promote, extend and enlarge the advantages of creditors—to construe it so as to take from a creditor any advantage he had before, unless there be express words for that purpose in the act itself, would offer an open violence to the designs and views of the Legislature, to the spirit of the act itself, and to the deductions of common sense; which, without any artificial rules of construction, would always suggest the propriety of promoting, rather than of repressing the intention of the law-giver, where a general intention was manifest. These observations apply directly to the *5th Geo. II. c. 7.* which by its title is expressed to be, and evidently was designed to give, more ample security to creditors for their debts, than they possessed under the act of *13th Edwd. I.* Our act of 1777 was made with the same view, and is bottomed on the same principles as the act of *Geo. II.* They are both in *pari materia*, and to the same effect and purpose; and as we apprehend, are subject to the same rules of construction: and as there are no express words in any of these acts, signifying any intent of the Legislature to narrow the security of a creditor in any instance, or to restrict the lien he had before

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Apr. 1794. by his judgment, to the time of issuing the execution, it would be absurd, and contradictory to all rules of construction, to say, that either of them should have any such operation, merely because by them a *fi. fa.* against land may be used, as well as the *elegit*, or say, instead of it. It is not the sound of a word that can make such an alteration of the law. In a part so material, such an alteration can only be effected by the express words of an act of Parliament, or by a sound interpretation, collecting the intents of the Legislature in things not expressed, from what they have expressed on things similar, and which are governable by the same reasons. Constructive alterations of the law, in its material parts, are not to be admitted but where some valuable purpose is to be effected, of more importance in the scale of justice or policy than the rule to be altered—but what valuable purpose can it answer to change the law in the manner they contend for? Is there any just reason, why the creditor now, should not have as much security for his debt, as before the act of *Geo. II.* yet if the lands are to be bound from the teste of the execution, the issuing of which may be delayed by various means, by accidents, as well as contrivances of the Defendant, the creditor may be defeated of his remedy entirely? Would it not have been better for the creditor then, that the old law should have remained, whereby his judgment would make him sure of his debt, as against the lands of the debtor, than to be subject to the act of *Geo. II.* to run the risk of the total loss of it? If their's is the proper construction, has not the act of *Geo. II.* made professedly for the benefit of the creditor, by receiving such a construction, most clearly done him an injury? If the *fi. fa.* against lands under this act, does not bind as from the time of the judgment, as the *elegit* did, but only from the teste, may not the Defendant, after judgment, in every instance, procure an injunction, writ of error, certiorari, or the like, and cause the teste of the execution, when permitted to issue, to be subsequent to a sale made by himself, or at the instance of another creditor in the mean time? Is not the security he had before by means of his judgment entirely done away, and all this by a construction of the act of *Geo. II.* which goes upon the notion, that he was not well enough provided for before, and proposes to ameliorate his situation? May not the Defendant suspend the execution by some of the means before mentioned, or contract debts afterwards, and by a

confession of judgment prefer this *ex post facto* creditor, Apr 1794
to the creditor by judgment should such a construction prevail? From this view of things, I cannot but be firmly persuaded, that it is diametrically opposite to the spirit and meaning of the act of *Geo. II.* and of our act of 1777, to say, they have operated a change so detrimental to the creditor, as that lands should be bound, not from judgment rendered, but from the time of the teste of the execution only.

I cannot but believe that lands are yet liable, as they were before the passing these acts, from the time of the judgment. This is the conclusion I infer from considering the case as detached from any express provisions in the act, and upon the supposition that there are none such; but it seems to me the words of the act of *Geo. II.* are clear to shew, that lands are liable as from the time of the judgment. Speaking of the manner in which lands shall be liable, it says, "shall be liable as assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts, due by bond or other specialty;" it then proceeds to direct that the lands may be sold—These words produce this question, How are lands liable in England to the satisfaction of debts due by bond or other specialty? The indisputable answer is, they are liable in England, and by the law of England, from the time of the judgment rendered against the obligor himself; and from the time of the suit commenced against the heir, when in his hands by descent: and in either case are bound to that creditor who first obtains his lien upon them, in preference to, and to the exclusion of, every other creditor whatsoever, until his debt be satisfied—are they not then by the express words of the act, liable here in the same manner? These words after ascertaining the extent of the liability of lands, have continued that liability, in terms as explicit as the language can furnish, as it was before; and hath declared, that though they are to be sold by a *fi. fa.* yet they are to be liable as in England, at the time of passing this act, in the same manner as if the process had never been changed. As far as I can learn, the opinion of the lawyers of this country have always been, that lands are liable from the time of the judgment, as well between creditor and creditor, as between creditor and debtor: and there is an act of our Legislature, lately passed, which shews that the *fi. fa.*

Apr. 1794 introduced by this statute for the sale of lands, does not bind like the chattel *fi. fa.* from the teste only; for if the *fi. fa.* introduced by this act took upon itself the properties of the chattel *fi. fa.* it does so throughout and in every instance, not in some only; and of course if there can be an instance shewn, where it binds as the *elegit* did, the inference will be, that it binds in that manner and to that degree, because the act of *Geo. II.* has not altered the liability of the land, or the lien of the judgment from what it was—now can any such instance be shewn? It is well known, and will not be disputed, that at the time the act of *Geo.* was passed in England, if a judgment was obtained against an heir for the debt of his ancestor, the land he had at the time of the original writ purchased, was liable: that is to say, the lands were bound from the issuing of the original writ; and when the *elegit* went against the heir, the Sheriff might seize the lands the heir had at the time of issuing the original writ. *Wood's Inst.* 630, and many other books. But in England as well as in this country, if the heir aliened before the action brought, there was no remedy—now, by our act of 1789, *ch. 39 sec. 3.* if the heir aliens before action brought, he shall be liable for the value; and says nothing at all of his alienation after the action brought. Suppose then the heir aliens after the action brought; if the *fi. fa.* binds from the teste of the writ only, the land cannot be affected by it; and this absurdly will follow, that he who aliens before action, and without knowledge perhaps of an action intended, will be liable, when he who aliens after a writ taken out against him, and served upon him, will not be liable at all. What reason can be assigned for the Legislature's omitting to make any provision in this clause for the case of alienation after action brought? Clearly none other than this—that by the law already in being, the lands were liable to execution, that the heir had on the day of the writ purchased; and therefore there was no necessity to say any thing about the case of alienation after action brought. But if the *fi. fa.* against lands binds only from the teste of the writ, lands aliened after action, and even after judgment are not liable.—This I think is one instance to prove, that the *fi. fa.* against lands, has a relation to a time prior to the teste of the writ. I will now cite another—it is by the same statute which introduces the *elegit*, and by the construction

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upon it, that lands are bound from the time of the acknowledgement of a recognizance in court—"Whence a debt shall be recovered or acknowledged in the King's court, or damages adjudged, it shall be in the election," &c. If the *fi. fa.* issues upon a forfeited recognizance, and the lands have been aliened after the recognition and before the issuing the *fi. fa.* the lands aliened are liable—it is so generally understood; were it not so, the recognizances we take daily for the appearance of persons indicted, would be of little effect. The process upon them is a *sci. fa.*—no bail is given—the parties bound may sell at any time before the *fi. fa.* issued, and depart—is not this an evil of great magnitude? Shall we introduce such an one by construction? All persons are dischargeable from prison upon recognizance given with sureties, unless for capital offences. May not the greatest offenders escape the stroke of public justice, which their demerits may have subjected them to, if the construction contended for takes place—if the *fi. fa.* against lands, like that against the personal estate, binds only from the teste?—I think this is another instance where it will be acknowledged, the *fi. fa.* against lands affects them, and attaches upon them as from a time prior to the teste: and if it does so in these instances why not in all? If the law in these instances remains the same as before the act of *Geo. II.* and notwithstanding the writ of execution is a *fi. fa.* why does it not remain the same in the case of a judgment recovered for debt or damages in common cases? How comes it that the act of *Geo. II.* operates partially, changing the construction of the act of 13 *Edwd. I.* as to some cases, and not as to others, when before the act of *Geo. II.* the words of 13 *Edwd. I.* extended to all these cases alike? Do not these considerations warrant us in saying, that the *fi. fa.* against lands, introduced by the act of *Geo. II.* has relation to a time prior to its teste? Do they not prove the *fi. fa.* against lands, and the *fi. fa.* against personals to be essentially different in their nature and effects? I shall take the liberty therefore, until better informed, to believe that lands in this country are liable upon a *fi. fa.* against lands, in the same manner as they were liable by the law of England before the passing the act of *Geo. II.* namely, from the time of the judgment rendered: and that the judgment creditor here hath the same advantage, as he had by the law of England, when that act was passed: that is to say, to have satisfaction out of the lands for his

Apr. 1794. debt preferably to any other creditor who has a posterior judgment : and that he cannot be deprived of this benefit by the executing a writ of execution upon such subsequent judgment. But let it be admitted that the *fi. fa.* against lands hath the same operation as the *fi. fa.* against personals ; yet still the Defendant in the present case, purchased, knowing of the prior lien of the Plaintiff's claim upon the land ; and weighing his case in the scale of reason and impartiality, it comes plainly to this—that he who hath plunged himself into this dilemma, that either he or another must suffer, when by forbearing to act, such dilemma would have been avoided without the sacrifice of any privilege, ought rather to take the consequence of his own imprudence, than to throw a loss upon one who in every respect hath been entirely innocent, and who at this moment is exposed to the danger of suffering, by the perverseness of the Defendant, who had full warning that what he was about to do, would produce the consequences that have followed.

Davie, for the Defendant—The Defendant has set up two distinct titles to the premises claimed by the Plaintiff, either of which ought to avail him as a defence in this case.

The 1st, by the purchase and conveyance from *James Massey*, the 22d of June, 1784, who had purchased the land from *William Massey*, 2d of July, 1782, as appears by a deed of bargain and sale, executed of that date.—The second title under the purchase at the sale made by the Sheriff on *Devany's* execution, 22d September, 1784—and as a number of objections have been made to the second in opening the cause, I will proceed to examine that first.

Devany's suit was an action of debt, and the writ became returnable to the June sessions, 1783, when a judgment by default was taken, and an enquiry ordered as to the value : at the same sessions the administrators of *Bell* obtained their judgment, and the Counsel for the Plaintiff has concluded, that *Devany's* judgment was barely interlocutory ; that this being a final judgment, became a preferable lien upon the lands, and that they were exclusively bound for its satisfaction. This conclusion, however, is questionable by the act of Assembly, usually called the *Court Law*, sec. 54. “The Defendant shall appear and plead or demur within the first three days of the term to which the writ shall be returnable,

otherwise the Plaintiff may have judgment by default, Apr. 1794. which in actions of debt *shall be final*, unless when damages are suggested on the roll." This case, being an action of debt for 5,000*lb.* of tobacco, is not within the exception stated in the act—no damages are in such cases ever "suggested on the roll," and the judgment is therefore final, according to the law and practice of the court.

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These judgments are called "final judgments" also in the 24th section, which authorises an enquiry as to the value the same term. The same doctrine is held in 3d *Black.* 397. where it is expressly laid down, that when a judgment is taken by default, by confession, or *cognovit actionem*, or by *non sum informatus*, which is a species of judgment by default in actions, where the specific thing sued for is recovered, as in actions of debt, the judgment is *absolutely complete*. He admitted that where the action sounds in damages, or damages in an action of debt are suggested on the roll, the judgment cannot be deemed final until a writ of enquiry is executed; and that the lien, if any, then commences on the judgment being given thereon; but that the judgment in *Devany's* case was absolute and final: and if lands are bound from the time that judgment is signed as awarded, then the lands of *Massey* were bound by the judgment of *Devany*, as well as by the judgment of *Bell's* administrators.—He also said that if *Massey* had died between the session of June and September, the action of *Devany* would not have abated, owing to the nature and effect of the judgment: that this point had often been determined, and upon the principle that such a judgment was in its nature final and conclusive as to the Plaintiff's demand.

As to the doctrine that lands are bound from the time of the judgment—he said, he admitted in the fullest manner, that the law had been so settled in England ever since the statute of the 13th *Edw. I* in all cases where the party took out an *elegit*, the only execution which in that country affected the lands of the debtor: but whether the lands are also bound in this country, when satisfaction is levied by a *fi. fa.* deserves some consideration—and we contend they are not.

1st. He observed that by the common law, the goods and chattels of the debtor, and the annual profits of his land, were alone liable to execution, a few cases excepted—as a judgment at the suit of the King or an action

Apr. 1794. of debt against an heir; & the lands were not liable, generally speaking, until the statute of 13th *Edw. I.* gave the writ, since called an *elegit*. The doctrine of lands being bound from the time of the judgment, must then arise either from the letter and direct operation of this statute, or the construction which the English Judges have thought proper to put on it. The statute is very short, in these words—"That when a debt shall be recovered or acknowledged in the King's court, or damages adjudged, it shall be hereafter in the election of him who sues for such debt or damages, to sue out a writ, that the Sheriff shall cause to be made of the lands and chattels of the debtor; or that the Sheriff shall deliver to him all the chattels of the debtor, excepting oxen and beasts of the plough, and the half of his land, until the debt shall be levied by a reasonable appraisement and extent," &c.—In this laconic statute, there is not one word enacting that the lands shall be bound from the time of the judgment rendered; nor in that part of the act directory to the Sheriff, is there any expression used from which such a doctrine can be reasonably inferred. It is therefore apparent, that the Judges in England, added this construction to advance the remedy given by the writ called an *elegit*. Neither the statute, nor this extraordinary construction of the Judges, altered the nature or operation of the judgment—the judgment remained precisely the same as before the statute was passed, but the statute gave a new execution or remedy: and the choice of this statute writ gave the Plaintiff a lien upon the lands from the time of the judgment rendered, according to the construction of the courts.—Thus, it was not the rendering of the judgment that bound the lands, but the suing out this new writ, and making the entry—*quod elegit sibi executionem fieri omnibus catallis et medietate terræ*; and if the party had made his election to sue out a *fi. fa.* or a *capias ad satisfaciendum*, the lands would have been, in all respects, precisely situated as if the statute of the 13th *Edw. I.* had never been passed—saying, it was therefore clear, that it was not the rendering the judgment, but election of the remedy given by this particular statute, which created the lien upon the lands. The law being thus correctly stated as it stands in England under the 13th *Edw. I.* it was now necessary to examine the history and doctrine of executions in this country—The common law chattel writ of *fi. fa.* was authorised to is-

sue against lands and tenements, by the statute of 5th Apr. 1794. *Geo. II.* enacting expressly, that lands and other real estate should be subject to the same process, and sold in the same manner as personal estates. In the year 1777, an act of Assembly was passed, enacting that all process which issued heretofore against goods and chattels, lands and tenements, or against goods and chattels only, should thereafter issue against goods and chattels, lands and tenements; only directing that the Sheriff should levy on the goods and chattels in the first instance, and if there was not sufficient to satisfy the execution, it was then his duty to levy also upon the lands: so that ever since the year 1732, the writ of *fi. fa.* has issued in North-Carolina against lands and tenements as well as goods and chattels—the act of *Geo. II.* declaring they should be subject to the same proceedings and process, and be sold in the same manner as personal estate. It is therefore only necessary to ascertain in what manner property is bound by awarding a *fi. fa.* This writ stands upon the same footing in this country, that it did in England before the 29th *Cha. II.* therefore the property of the debtor is bound from the teste of the writ. 2 *Bac.* 352. *Salk.* 322. 8 *Co.* 71. It is unnecessary to multiply authorities on this point. If a Plaintiff should sue out a *capias ad satisf.* the goods of the debtor are not in any manner bound; but if a *fi. fa.* is awarded, then the goods are bound from the teste of that writ, although it should not be delivered to the Sheriff for months afterwards—so, in like manner in England, if the Plaintiff chose an *elegit*, the lands were bound from the time the judgment was rendered—not by the judgment, but from the time the judgment was entered. The *fi. fa.* has a retrospective operation to the time of the teste of the writ, the *elegit* to the time of rendering the judgment. The law then is clear the *fi. fa.* can only operate upon the property of the debtor from the teste of the writ. There is no act of Assembly which alters this plain and positive law, nor any determination even of the most loose authority, which supports the doctrine advanced by the Counsel for the Plaintiff. Thousands of authorities may be easily cited, supporting the construction of the statute of *Edw. I.* as it respects the *elegit*, but not one can be produced, even in this country which transfers the quality of retrospective operation of the *elegit* to the writ of *fi. fa.* The *fi. fa.* issued in *Devany's* judgment from

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Apr. 1794. March sessions, 1784, and was levied upon the premises in question; at the sale the Defendant became the purchaser of the right of *William Massey*, and the Sheriff conveyed accordingly. The *fi. fa.* under which the lessor of the Plaintiff purchased, bears teste the 18th May, 1789--if therefore it is the prior teste that gives the execution a preferable lien upon the property, the lands in question could not be affected by the execution issued upon *Bell's* judgment. There is also another objection to the Plaintiff's title as derived under this sale—If the execution issued on the judgment obtained by *Bell's* administrators, had actually borne teste before that of *Devany*, & had even been delivered first to the Sheriff; yet, if the Sheriff executed *Devany's* writ first, the second levying and sale would be void; and the vendee under the first, or *Devany's* sale, would keep the land. 2 *Bac.* 356. *Carth.* 419, 420. 1 *Salk.* 320. The reasons upon which this law is grounded, are evident. The *elegit* never altered the property, but the *fi. fa.* transfers the whole property to the vendee—and no man would be safe under a Sheriff's sale, if a contrary doctrine should prevail; and policy and justice are concerned in quieting the purchaser under a sale made by execution.

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It is also to be observed, that in England, when lands are delivered by *elegit*, upon the reversal of the judgment by a writ of error, the lands themselves are restored to the Defendant: but this can never be the case when a sale is made by virtue of a *fi. fa.* then the money only can be restored—and such is the judgment of the court. The execution was valid at the time, and the property is completely changed and transferred. There is nothing in the origin, operation, or consequences of the *elegit*, that can be assimilated in any manner to the old common law writ of *fi. fa.* 2 *Bac.* 370. 8 *Co.* 19, 143. *Cro. Jac.* 246. *Cro. Eliz.* 278.

He then concluded that the title of the Defendant was good, made under the sale on *Devany's* execution, in both points, whether it depended on the teste of the writ, or the priority of levying and sale.

He then proceeded to state, what he called, the first title of the Defendant, derived under the purchase from *James Massey*—observing that as to the points, that voluntary or fraudulent conveyances are void as to creditors, and that executions may be postponed by fraud—these were general positions which no man would ques-

tion—and made some lengthy remarks on the testimony brought forward on the other side to impeach the conveyance from *William* to *James Massey*, on the ground of fraud, and concluded for the Defendant. Apr. 1794.

In reply it was said—The judgment by default does not bind the land—because in reality these interlocutory awards are not judgments, but something done by the court towards putting the cause in a condition for judgment. This appears by the 11 *Rep.* 40. *a.* where these proceedings are said to be but awards of the court and not definitive; and such proceedings cannot be pleaded by an executor as judgments against his testator. 1 *Salk.* 42, 399. 2 *Nels. Ab.* 1053. And at common law, by the death of the Defendant the whole suit would have abated—unless there had been a final judgment, the suit in such circumstances may be discontinued, the Plaintiff may be nonsuited, and no writ of error will lie upon such award of the court; because judgment *non sit redditum*, which the writ of error requires. 11 *Rep.* 38. *b.* 40.—The words of the act introducing the *elegit*, are *si damna adjudicata, sit in electione, &c.* Now, the entry of a judgment by default is in this manner—“Because it appears to the court that the Plaintiff ought to recover, therefore.” &c. It cannot be said upon this entry that damages are recovered. The entry of the final judgment is, that the Plaintiff do recover, &c. and then, and not before, damages are adjudged: and it is in the election of the Plaintiff to take out his writ of *elegit*, and charge the lands, and then, and not before, are they bound.—*Att. P. K. B.* 380. 3 *Bl. Com.* 398. shew the manner of entering these defaults—The writ of *elegit*, speaking of the lands to be seized and extended, describes the lands he had *die quo redditum fuit judicium*; and *Morg. Pl.* 341, 345. and 11 *Rep.* 40, 38. *b.* explains *redditum sit*, to be intended of a final judgment. If a suit in the circumstances of *Devany's* in June term, 1783, could not have abated by death, what would have been the situation of the Plaintiff—he could not proceed by *sci. fa.* to make new parties—this was a proceeding introduced by a late statute. He would at the common law then be so circumstanced, that he could neither proceed and get judgment for want of a Defendant, nor be dismissed the court by an abatement of the suit, and he must have lost the benefit of his tobacco bond forever. It was not from the mere circumstance of the act's introducing the *elegit*, (93)

Apr. 1794 that the lands were bound—why should this or any other circumstance, independent of reason and propriety, affect any thing? The land was construed to be affected by the judgment, the better to answer the spirit of the act, which was made for the benefit of creditors—it was a construction made to conform to the will of the Legislature, in a thing they had omitted to express—which will, the Judges discovered from the occasion and the reason of introducing the act, and from the provisions of it in cases expressed by the Legislature. It is true the Legislature, by the act of *Geo. II.* did mean to put lands in the situation of personal estate, with respect to execution; but it was in one particular only, and in no other—to-wit: to make them transferable forever to a purchaser, by the sale and deed of the Sheriff. It did not intend to alter the legal properties of land, nor the measure of their liability to judgments. The lien upon lands by judgment remains the same as before. There is no ground for saying the Parliament intended a benefit both to creditor and debtor. Does the act intimate that the debtor laboured under any inconvenience? Does it not solely respect the better security of creditors?—It can easily be shewn, that the *fi. fa.* against lands hath many of the qualities of the *elegit*—it affects lands in the hands of the heir from the time of the commencement of the suit against him—this is proven by the act of 1789—so does the *elegit*—and so does not any chattel writ of *fi. fa.*—when a recognizance is given to the state and forfeited, the *fi. fa.* issues, and it affects the lands the recognizer had the day of the recognition made, according to the words of it: here the *fi. fa.* like the *elegit*, relates to a time long prior to its teste, which a chattel writ of *fi. fa.* ever did. And there has been, as I am informed, a decision in the court of *Morgan*, that lands sold under a *fi. fa.* shall be restored upon the reversal of a judgment—I think it was in the case of *Whitbread*—If this be correct, then it is another instance where the *fi. fa.* against lands has the quality of an *elegit*. It is true, many authorities can be shewn to prove, that goods are only bound from the teste of a writ of *fi. fa.* but this argument proves nothing. Can it be shewn, that at any time since the passing of the act of *Geo. II.* it has even been held that the *fi. fa.* against lands did not bind from the time of the judgment, but from the teste only? It appears to me from every point of view in which I can

place this case, that land is liable to execution as from ^{Apr. 1794.} the time of the judgment rendered, as it was both here and in England at the time of passing the act of *Geo. II.* and that that act hath made no alteration but this—that the lands are to be sold instead of being extended as before, and consequently that the Plaintiff in the case now before us, is entitled to recover.

Judge *Ashe* had retired from the bench before the arguments were closed.

Judge *Macay*—This is a dispute of great consequence, and it is proper it should be well settled, and I very much regret the necessity I find myself under of deciding alone—however, Judge *Ashe* who hath just left the bench, conferred with me before he went away, and accords in the opinion I am about to deliver. He then stated the case, and proceeded thus:—As to the deed from Old *Masse*y to *James*, which is argued to be fraudulent, and therefore void—Fraud will certainly vitiate any transaction into which it enters—but it is a rule of law, that fraud must be proven—it will not be sufficient to suggest it only. For my part, I cannot perceive any fraud in that transaction, but the jury have heard the evidence, and will draw their own conclusions. With respect to what is argued by the Counsel for the Defendant, that the judgment by default upon the tobacco bond, in June term, 1783, binds equally with the final judgment of *Bell's* administrators—the taking a judgment for want of a defence on such a bond, is not a final judgment—it is an interlocutory proceeding only—before any execution can issue, a jury must be called in to assess the value, and then there must be another judgment entered to complete it. We are also agreed that a judgment binds the lands from the time it is pronounced, but in this wise only—it hinders the debtor from disposing of the land himself; but if a *fi. fa.* issues upon a subsequent judgment, and comes to the hand of the Sheriff, and he sells the lands, the title of the vendee under such execution cannot ever afterwards be defeated—it is valid to every purpose.—Were the law not so, it would be the most dangerous thing in the world to purchase lands at an execution sale. Dormant judgments might be revived a long time afterwards, & the innocent vendee evicted, without the possibility of ever regaining the purchase money—who can he apply to for it? It is true there was such a case decided at Morganton as that cited at the bar: but there the land was

Apr. 1794. *puis darrein* continuance—that he had recovered in an action against another Defendant, who was a party to the same trespass, and had judgment against him : and neither Plaintiff nor Defendant had witnesses now ready to prove the trespass, or that it was the same trespass for which damages had before been recovered.

Haywood for the Plaintiff—The plea *puis darrein* continuance, is a waiver of all former pleas, and amounts to an admission of the facts stated in the declaration : and he cited 3 *Bl. Com.* 317. who cites *Cro. El.* 49. and he also cited a case lately decided at Salisbury, between the administrators of *Hillary Butts*, Plaintiffs, and

(97) Defendant, where it was pleaded since the last continuance, that the Defendant has obtained a release from the administratrix, who was a married woman : whereupon it was insisted by the Plaintiff's Counsel, and so ruled by the Court, that this plea is a waiver of all former ones, and an admission of the truth of the declaration.

Davie e contra—The act of 1777, *ch. 2 sec. 34.* allows the Defendant to plead as many several matters as may be necessary for his defence, so that he be not admitted to plead and demur to the whole ; when therefore any pleas necessary for his defence are put in, they are each to be presumed to be material, and not one a waiver of the other which happens to be prior to it.

Per Curiam, Judge *Ashe* and Judge *Macay*—A plea *puis darrien* continuance, is a waiver of all former pleas, and an admission of the declaration ; and the Defendant not being ready to prove his plea, Plaintiff had a verdict and judgment for one penny.

NOTE.—Vide *McDaniel v. Tate*, in a note to *Smith v. Powel*, *post* 453. 1 *Chitty's Plead.* 636.

Carter's Executors v. Rutland.

Negroes sent with a daughter upon her marriage, or with a son-in-law and daughter, is *prima facie* evidence of a gift ; and if the property remains any length of time with them, very strong proof will be required to show that only a loan, and not a gift, was intended.

The following facts were stated in this case by the parties as a *case agreed*, and submitted to a jury on the issue *non detinet*, under the direction of the court as to the law.

Facts agreed to, in the case of *Lazarus Carter, Executor of Isaac Carter, v. Shadrach Rutland.*

Shadrach Rutland and *Parthena Carter*, daughter of *Apr. 1794.*
Isaac Carter, of Hertford county, were married the 12th
 day of November, 1775. About the middle of the year
 1776, a negro woman, *Nann*, with a young child, *Saul*,
 was sent by *Mr. Carter*, to said *Shadrach* and *Parthena*.
 —*Nann's* issue since is, *Bob, Hastie, Tibbie* and *Lydia*.
 Some time in the year 1781, said *Shadrach* and *Parthena*
 were on a visit at *Mr. Carter's*, and they were directed
 to take a negro boy, *Peter*, home with them. Again, in
 the year 1782 or 1783, said *Shadrach* and *Parthena* were
 on a visit at *Mr. Carter's*, and they were directed to take
 a negro girl, *Maggy*, home with them—*Maggy's* issue
 is, *Homer, Penny, Violet* and *Willis*.

Mrs. Parthena Rutland died in August, 1788, and *Mr.*
Isaac Carter died the 8th July, 1792.

It was also admitted on the trial, that *Isaac Carter*
 had bequeathed these negroes by his last will, to his
 grandchildren by *Parthena*, and the executor had made
 the usual demand, and that the Defendant was in posses-
 sion.

Per Curiam—When a man sends property with his
 daughter upon her marriage, or to his son-in-law and
 daughter any short time after the marriage, it is to be
 presumed *prima facie*, that the property is given abso-
 lutely in advancement of his daughter; and when the
 property is permitted to remain in the possession of the
 son-in-law for a considerable length of time, as in this
 case, it will be necessary to prove very clearly, that the
 property was only lent by the father, and that it was ex-
 pressly and notoriously understood not to be a gift at the
 time. The peace of families and the security of creditors,
 are greatly concerned in the law being thus settled.—
 Every transaction in human life ought to be considered
 under its ordinary circumstances—these will sufficiently
 express the intention of the parties, and generally more
 unequivocally than the appointed solemnities of the law.
 This property was given in the usual manner—that is,
 sent with them on their going to house-keeping, as it is
 called, or sent to them as soon as the parent could make
 the necessary arrangements in his farm or family for
 that purpose.

Under this charge, there was a verdict and judgment
 for the Defendant.

NOTE.—Vide Note to *Farrel v. Perry*, ante 2.

Apr. 1794. *puis darrein* continuance—that he had recovered in an action against another Defendant, who was a party to the same trespass, and had judgment against him: and neither Plaintiff nor Defendant had witnesses now ready to prove the trespass, or that it was the same trespass for which damages had before been recovered.

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Mrs. Parthena Rutland died in August, 1788, and *Mr. Isaac Carter* died the 8th July, 1792.

It was also admitted on the trial, that *Isaac Carter* had bequeathed these negroes by his last will, to his grandchildren by *Parthena*, and the executor had made the usual demand, and that the Defendant was in possession.

Per Curiam—When a man sends property with his daughter upon her marriage, or to his son-in-law and daughter any short time after the marriage, it is to be presumed *prima facie*, that the property is given absolutely in advancement of his daughter; and when the property is permitted to remain in the possession of the son-in-law for a considerable length of time, as in this case, it will be necessary to prove very clearly, that the property was only lent by the father, and that it was expressly and notoriously understood not to be a gift at the time. The peace of families and the security of creditors, are greatly concerned in the law being thus settled.—Every transaction in human life ought to be considered under its ordinary circumstances—these will sufficiently express the intention of the parties, and generally more unequivocally than the appointed solemnities of the law. This property was given in the usual manner—that is, sent with them on their going to house-keeping, as it is called, or sent to them as soon as the parent could make the necessary arrangements in his farm or family for that purpose.

Under this charge, there was a verdict and judgment for the Defendant.

NOTE.—Vide Note to *Farrel v. Perry*, ante 2.

Sep. 1794.

MORGAN, SEPTEMBER TERM, 1794.

Steele v. Anthony.

A grant from the State without the seal appendant, offered in evidence. Judge WILLIAMS thought that the deed was destroyed by the seal's being torn off. But ASHE Judge, was clearly of opinion, that where an interest once passed and vested in the grantee, the destruction of the deed could not affect the interest before passed by it.

Ejectment. Plaintiff in making out his title, produced a grant from the State without the seal appendant, but it had been registered in the Register's office. It was signed by the Governor, and countersigned by the Secretary.

It was objected by *Avery* and *Henderson*, that the seal being not appendant, the grant is nullified, and therefore it cannot be produced in evidence; in like manner, if the seal of a bond be torn off, the bond cannot be read in evidence. They cited *Bull. Nisi Prius* 172. 11 *Rep.* 28.

Haywood e contra—When the seal of a bond is torn off, the presumption is, that it was done in order to cancel the bond, and the existence of the debt depends upon that of the bond; when the bond becomes extinct in point of law, the debt is also extinct: but in cases where an interest passes and vests in the grantee by the operation of the deed, though that deed be afterwards destroyed, that will not re-vest the interest thus passed. It would be of the most alarming consequence, if in every case where a deed of bargain & sale was destroyed by tearing off the seal, the bargainee or grantee should lose his lands. He cited *L. Evid.* 107, 108. *Bull. Nisi Prius* 267, 268. Besides, if this paper cannot be read as the grant itself, it surely may be read as a copy or paper containing the words in which the real deed was conceived. The rule is, when
(99) a deed is lost, a registered copy, or a sworn copy, may be given in evidence; or for want of such an abstract, the contents may be given in evidence. In taking these copies however, there may be a mistake and variance from the original, but here there can be no such mistake, and therefore this paper is better than a registered copy, as being less liable to deceive us, and therefore on this ground it ought to be read.

Judge *Williams* cited 2 *Bl. Com.* 295. and thought that in every case where the seal was torn off, the deed was destroyed, and inclined to be of opinion that the paper offered could not be read as the grant; but Judge *Ashe* was

clearly of the contrary opinion, he said, where an interest once passed and vested in the grantee, the destruction of the deed afterwards could not affect the interest before passed by it; and that this was not like the case of a bond, where the debt must be presumed to be extinct where the instrument which evidenced it, appeared to want one of its most essential constituents: for when the seal is torn from a bond, the conclusion of law is, that the bond was meant thereby to be cancelled. They agreed to reserve it as a point for further discussion, but the jury found for the Defendant upon other grounds.

State v. Magniss.

Recognizances bind lands from the time at which they are entered in to, but a *fi. fa.* only from its teste.

In this case the Defendant, who had been bail for his son, applied to the court upon an affidavit filed, to be relieved from the forfeiture of his recognizance, upon which judgment final had been entered under the act of 1788, *ch. 32. sec. 2.* and to be permitted to enter into new recognizance to attend as a witness at the next term: but it was said he was about to move out of the State.—Whereupon the Attorney-General opposed this application. He said his former recognizance ought not to be remitted, for in that case the State would have no hold at all upon him; for though he now had lands he might sell them and move away, and they were not liable to the recognizance but only from the time the *fi. fa.* issued against them: and for this he cited the case of *Bell v. Hill*, determined at Halifax Superior Court. He further said, if the *fi. fa.* could have no retrospect in a case where it issued upon a judgment, it could have none where it issued upon a recognizance forfeited; and that a recognizance had no greater force to bind the land than a judgment had, for that each were mentioned in the same manner in the statute 13th *Edw. I. ch. 18* which introduced the *elegit*.

Judge *Ashe* made no observations.

Judge *Williams*—The decision at Halifax was a proper one. In England, where the lands are bound from the judgment, there judgments are entered in the King's Bench or Common Pleas only; thither all persons may resort with a certainty of finding whether or not such a judgment as would affect lands, had been entered up:

Sep. 1794. but in this country, judgments are not capable of creating such notoriety—no man knows where to search for a judgment that he suspects may be probably taken—the Superior Courts—the County Courts—and Justices of the Peace out of Court—may pass judgments to affect land, and no one knows where to search for them. It is very proper therefore in this country, that lands should be bound in case of judgments, but from the time of the teste of the *fi. fa.* only; but recognizances remain as they were, because the land is made liable expressly by the words of the recognizance—"to be levied of my goods and chattels, lands and tenements, upon condition," &c. Now, when this condition is not complied with, it is the same thing as if he had expressly bound his land to pay that sum absolutely and unconditionally on the day of the recognizance made.

Judge *Ashe* assented.

NOTE.—Vide *Bell v. Hill*, and note thereto, *ante* 72. *Burton v. Murphey*, *N. C. Term Rep.* 259.

State v. Brown.

A horse stolen in one State or Territory and carried into another, will not make it a felony in the latter State. A special verdict which states the *felonious* taking in one State, and the taking continued into another, cannot be supported as a felonious taking in the latter.

Indictment for stealing a horse in the county of Burke. The jury found specially that the felony was committed in the Territory South of the Ohio, and that the trespass was continued into this State, where he was taken. The Attorney-General cited *Hale's Pl. Cr.* 507, 508. and *Harw. P. C.* 90. and he insisted, that as the asportation into another county, is in law a new taking in this latter county; so a taking out of this State, and an asportation into it, is a new taking here—and so the prisoner is guilty of felony here: he cited a case which he had from the information of *Mr. Avery*, who was now present and affirmed it, that while he was Attorney-General, a man was tried at Hillsborough, who had stolen a horse in the county of Mecklenburg, in Virginia, and brought it into this State; and this appearing upon evidence, a doubt was conceived, whether he was guilty of felony against the law of this State; but *H. H. P. C.* being cited and relied upon, the court upon deliberation were of opinion, it was a felony punishable by the laws of this State,

and the man was hanged : but *per Judge Ashe*, if this man were tried and condemned here, or tried and acquitted here, would the sentence of this court be pleadable in bar to an indictment preferred against him in the Territory South of the Ohio ? I think it would not ; because the offence against the laws of this State, and the offence against the laws of that country, are distinct ; and satisfaction made for the offence committed against this State, is no satisfaction for the offence committed against the laws there. The consequences then of trying this man here and condemning him, will be, that if a man steals a horse in one part of the continent, and goes with him to another, through several States, the culprit according to the several laws of each State, being guilty of a taking in each, may be cropped in one, branded and whipped in another, imprisoned in a third, and hanged in a fourth ; & all for one and the same offence. This is against natural justice, and therefore I cannot believe it to be law—when a man steals in this State, and carries the thing stolen into another county, he is guilty of the the same offence, and punishable in the same degree and by the same law in the latter as in the former county, and is punishable but once ; if convicted or acquitted in the latter county, he may plead *autre faits* convict or acquit, of the same felony before, when indicted in the former ; which shews that the law considers the felony that was committed in the first, otherwise it could not be pleaded as the same in the case before mentioned.— Now if the felony in this State, is the same felony that was committed in the Territory South of the Ohio, then it is a felony against the laws of the Territory, and punishable there by pillory, branding and whipping, and not by death. It would be strange then to say, he should be punished here with death, for an offence against the laws of another State, which punishes only with infamy.— This is my opinion upon the reason of the case as it now occurs to me, and I am confirmed in it by looking into *Hawkins Pleas of the Crown*, where after stating the same doctrine as it is stated in *H. H. P. C.* relative to the asportation being a new taking, he says, but if a piracy be committed on the sea, and the goods be brought to land, the pirate cannot be indicted as a felon, because the original felony was not within the cognizance of the common law—and why ? Because not committed within the extent of those limits that are subject to the law of

ep. 1794.

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Sep. 1794. *England.* So here this offence has not been committed within the territory subject to the laws of this State, and therefore the prisoner is not liable to be punished by these laws: I think we cannot pass judgment upon him, however worthy he may be of death. I cannot remember the case cited by *Mr. Avery*, and I think he must be mistaken. Also for another reason we cannot pass judgment against the prisoner, this special verdict states at first that the felony was originally committed in the Territory South of the Ohio; then that the taking was continued into this State; but it does not state the felonious taking to be continued into this State, and therefore we cannot say that the taking spoken of by the jury was a felonious taking, and without a felonious taking the prisoner cannot be guilty of the crime laid in the indictment.

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Judge *Williams*—I do not remember the case cited by *Mr. Avery*, if there was such a case it was so adjudged on account of some peculiar circumstances now forgotten; but at present I concur in *omnibus* with Judge *Ashe*.

So there was judgment for the prisoner, and he was discharged.

State v. Allen Twitty.

If an out-house be so near the dwelling-house, that it is used with the dwelling-house, as appurtenant to it, burglary may be committed in it. In this case, the out-house was seventeen and a half feet from the dwelling-house.

Indictment for a burglary in the mansion-house of the prosecutor, one *Haslip*, and taking from thence a cask containing twenty gallons of brandy, &c.

Upon evidence it appeared, that *Twitty* broke open, in the night time, a little out-house, about seventeen and a half feet from the dwelling house, and took out the brandy, &c. and it was insisted on the part of the prisoner, that this was not burglary. The indictment lays it to be a mansion-house, but it has been determined, that where the jury find the house to be separated from the dwelling-house only eight feet, and that the breaking and entering was in that house, it is not burglary; and cited an authority from *Leach*, who has a case to that effect.

E contra, it was urged, that if the out-house be so near the dwelling-house, that it is used together with the

dwelling-house as appurtenant to it, that it is burglary ^{Sep. 1794.} to break it in the night time with intent to commit a felony; and it is not necessary for this purpose that it should be inclosed with the dwelling-house in the same inclosure—if it stands within the curtilage it is sufficient—the meaning of which term in law is, a piece of ground either inclosed or not, that is commonly used with the dwelling-house. *Jacob. verb. Curtilage. 6 Rep. 64.* And to prove that if the house stands within the curtilage, it is the subject of burglary, he cited *Bl. Com. 225. 1 H. H. P. C. 558, 559. H. P. C. 104.* As to the case cited from *Leach*, he said it was so adjudged on account of the special finding. It must of necessity be stated in every indictment of burglary, that it was committed in a mansion-house; and out-houses included within the curtilage, according to the definition of that word just given, may be considered by the jury upon evidence given to them, to be parts and parcels of the mansion-house; and may conclude and say upon such evidence, that the offence was committed within the mansion-house as laid in the indictment—like as in trover, when it appears in evidence, the Defendant was possessed of the goods declared for, and that there was a demand by the Plaintiff, and a refusal on the part of the Defendant, the jury are warranted in concluding and finding there was a conversion; but in the one case, if they do not expressly find it was a dwelling-house, but an out-house only; and in the other, if they do not expressly find a conversion, but possession, demand and refusal only—the Court cannot conclude in the one case, that it was a dwelling-house; nor in the other, that there was a conversion—the Court are not empowered to draw any conclusion from facts specially proved or stated in a special verdict—that solely belongs to the province of the jury. Therefore the case cited from *Leach*, where the jury find it to be an out-house, separated from the dwelling-house, and do not expressly say, as they ought, that it was a mansion-house, the Court must take it, as the jury have stated it, to be an out-house only, and not a mansion-house as stated in the indictment; and of course they cannot say it was burglary, for that must be committed in a mansion-house. This is the reason why that case was so adjudged, and not because to steal out of such an house is not burglary; and so that case is not at all repugnant to what is laid down in the authors I have cited, but is perfectly

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Sep. 1794. consistent with what they have stated—and of this opinion were the Court; and both Judge *Ashe* and Judge *Williams* charged the jury accordingly; but yet they found him not guilty of the burglary, but guilty of the larceny only—and he was burnt in the hand and discharged.

NOTE.—*State v. Wilson*, post 242. *State v. Langford*, 1 Dev. Rep. 253.

State v. Webb.

Depositions taken in the absence of a criminal, shall not be read against him.

Pleasant Webb was indicted for horse-stealing, and upon the trial the Attorney-General offered to give in evidence the deposition of one *Young*, to whom he had sold the horse in South-Carolina, but a very short time after the horse was stolen; and cited in support of this attempt, 2 H. H. P. C. 284. H. P. C. 429. Bull. 252. La. Evid. 140, 142. 3 Term Rep. 713.

(104) But *per curiam*, Judge *Ashe* and Judge *Williams*—These authorities do not say that depositions taken in the absence of the prisoner shall be read, and our act of Assembly 1715, ch. 16, clearly implies the depositions to be read, must be taken in his presence: it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine; and though it be insisted that the act intended to make an exception in this instance, to the rule of the common law, yet the act has not expressly said so, and we will not, by implication, derogate from the salutary rule established by the common law. So the deposition was rejected.

NOTE.—Vide *Philips on Evidence*, 299, and see whether the English practice upon this subject is founded upon principles that ought to be adopted in this country.

SALISBURY, SEPTEMBER TERM, 1794.

Samuel Bailey's Adm'rs. v. Robt. Cochran's Adm'r.

Former administrators removed, and another appointed, but not made a party to this suit. The latter administrator will not be allowed to plead any thing to this suit; and the former administrators cannot plead the repeal of their letters, after the first term since their repeal. An account settled and signed by one administrator is binding upon all, and will bear interest from the time it was signed.

In this case it was moved on the part of the Defendant, that he might be at liberty to plead *puis darrein con-*

Sep. 1794.

tinuance; that a judgment had been obtained at the last term of this Court against the administrators of *Cochran*, for a sum which was more than sufficient to exhaust all the assets. It was objected on the part of the Plaintiff, that this suit was brought against two persons, who at that time were the administrators, but who long since had been removed by the County Court of Cumberland, and the present administrator appointed in their stead, but that this suit was never against the latter administrator; and that this matter which is now sought to be pleaded, had never been pleaded by the former administrators; and that as the present administrator was not any party to this suit, he could not plead the plea moved for. *Et per curiam*—This latter administrator cannot plead any thing to the suit: and as to the former administrators, they cannot now plead the repeal of their letters of administration, they should have done so at the first term after the repeal; but several terms of this Court have intervened since the repeal, and they now come too late.

The Plaintiff produced an account stated and signed by one of the former administrators, and insisted that by act 1786, *ch. 4, sec. 8*, he was entitled to interest on the balance of the account from the time of its being signed; and to this, upon argument, the Court assented, saying the act of one shall bind both. And the Plaintiff had a verdict accordingly.

NOTE.—The plea of the repeal of the letters would come as a plea *pais darrein continuance*, and therefore not allowable, except plead at the proper time. See *Chit. Plead.* 636. Whether the act of one administrator is binding upon the others, see *Mangum's adm'r's v. Sims*, 1 *Car. Law Rep.* 547.—*Gordon v. Finlay*, 3 *Hawks*, 239.—*Toller on Ex'rs.* 408.

James Murphy v. Alexander Work.

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The Defendant on his part offered in evidence the deposition of a *Mrs. Work*, which appeared not to have been signed by her—objected, that a deposition thus circumstanced cannot be read, because if the party had sworn falsely, she could not be indicted for it; or if indicted, she could not be convicted, the deposition not being signed by her could not be given in evidence against her: and to support this position, was cited *Bull. Nisi Prius* 239. But per Judge *Williams*, Judge *Ashe* assenting—in case of an indictment for perjury for a false oath in ma-

Sep. 1794. King a deposition, it is most proper that the party's name should be signed, in order that she may be more easily identified by proof of her hand-writing—yet if she can be otherwise proved to have sworn to the deposition, she may be convicted; therefore this deposition should be received, though it be not signed by the deponent. *Vide* 1 *P. Wil.* 414. 2 *Eq. C. Ab.* 417, *contra*, and the deposition was read accordingly.

NOTE.—*Vide State v. Ransome, ante* 1, in which it was held that a person might be indicted upon an affidavit not signed. See the next case.

Rutherford v. Nelson.

It is usual to read depositions, where it appears that they have been read in the Court below, unless it can be shown that there is an irregularity in them; and the want of deponent's signature is not sufficient to reject them.

The Defendant offered to read the deposition of one *Fishburne*, which had been before read in the County Court upon the trial of this cause there; but *Fishburne* had not signed the deposition: it was opposed by the Counsel for the Plaintiff as being irregular—he said he had understood it had been usual to read depositions in the Superior Court, upon the mere circumstance of its appearing the same had been read in the Court below; but he had also understood that this rule was not an universal one, and that such depositions had most generally been read in the Superior Court by consent of parties, and it certainly could not be universally proper, for it might be that the very cause of the appeal was the improper admission of depositions in the Court below—here there was an irregularity, the deponent not having signed his name; which he took to be necessary, inasmuch as without it he could not be well prosecuted for perjury, in case of falsity. But *per curiam*, Judge *Ashe* and Judge *Williams*, it has been usual to read depositions where it appears they have been read in the Court below; though perhaps this rule might not be a proper one, in case the party opposing the reading could shew an irregularity to the Court here. But he does not shew it in the present instance—he only alleges the deposition was not signed by the deponent. But we have already decided it this term, that the want of the deponent's signature, is not sufficient to prevent the reading his deposition, if it be certified by the Justice or Com-

missioner to have been sworn to : for we must give credit to this certificate, so far as to believe that the party was sworn. So the deposition was read. Sep. 1794.

NOTE.—Vide the preceding case of *Murphy v. Work*.

Reynolds v. Flinn.

The act of 1777, *Rev. ch. 114*, voiding titles, &c. means void as to the state which proceeds to avoid by *scire facias*.

Ejectment. The Plaintiff produced a state grant for the lands in controversy, and rested his cause upon it. The Defendant alleged and offered to prove, that one *Murphy* had entered this land in the Entry-taker's office—that it had been sold as *Murphy's* property by execution, and under that sale came to the Defendant—that afterwards *Reynolds* the Plaintiff, having a knowledge of these circumstances, procured the entry to be transferred, as it is called, in his name—that is, to have the name of the original enterer erased, and his own inserted in its place. He did this with intent to defeat the interest of the purchaser, and then secretly obtained his state grant.

Judge Williams—I know of no law by which lands only entered, and not appropriated by the execution of a grant, can be sold. The enterer has no title or property till his grant is completed.

Counsel for the Defendant—Whatever the party himself may sell and dispose of, the Sheriff may sell and dispose of for him by execution to satisfy his debts, and by act 1779, *ch. 4, s. 4*, it is enacted, "That in case of the death of any person, who heretofore has made an entry of land, or who hereafter shall make an entry, pending the same, or before the making out the grant, his or their heirs or assigns shall have a fee-simple in the premises, although the grant shall be made in the name of the decedent." By the word assigns here used, it is plainly implied he may sell and dispose of the interest he has acquired by the entry, and that such sale and disposition shall vest a fee in the purchaser, upon the event of the grant issuing after the death of the enterer in his name : and if it be true that the Sheriff may sell by the authority of an execution, all such property, or subjects of property, as the debtor himself can sell, this clause authorises the sale of lands which a debtor has entered ; and then it follows that the law should protect such sale, with as much ease, and by the same rules that it protects sales of other subjects of property.

Sep. 1794. But *per curiam*, Judge *Ashe* and Judge *Williams*—

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Here the Plaintiff has a state grant, and it would be of the most dangerous consequences to void it by parol testimony. It is true, that the act of 1777, *ch. 1, sec. 9*, says, that every right, title, claim, &c. obtained in fraud, elusion or evasion of the premises of that act, shall be deemed void—but the meaning is, it shall be void as to the State, who may proceed to void it by *sci. fa.* and having a judgment founded on that on record expressly against it—not that it shall be voided, upon evidence in an ejectment by an individual citizen. It is true also that the act further directs, that a party preferring a subsequent claim, shall give bond to prosecute the claim with effect, &c. as has been stated at the bar; but as this case is offered to be proven, that would be an act to be done by the Defendant, when he found that *Reynolds* had procured the entry to be transferred in his name. The Defendant should then have gone to the office, and caused a *caveat* to be entered, and should have given the bond that the act directs. It has been argued that the Defendant was a purchaser, and that the Plaintiff having this grant with an intention to defeat that purchase, it was void under the act against conveyances to defraud purchasers; but that act was intended to void the deeds of private individuals made for such purposes, not deeds granted by the State. The law will not suppose the State concerned with one individual to defraud another; and indeed it is much to be doubted, whether an entry can be sold by execution. And if it cannot, then the Defendant is not a purchaser within the meaning of that act. There are many things a man himself may sell, which cannot be sold by execution—if the Defendant hath a judgment for a sum of money, the Sheriff cannot sell it upon a *fi. fa.* and besides the act cited does not authorise a sale by the enterer, it directs when the grant from the State comes out in the name of the decedent, the assignee shall have a fee-simple in it—it may mean an assignee in law as a devisee, &c. The act does not say that in all cases the enterer may sell, and that his sale shall be good. *Et per Williams* to the jury—This is so clear a case that the jury need not go a foot from the bar. Yet they did retire, and after some time, found according to his direction, for the Plaintiff—*Quere de hoc.*

NOTE.—Vide accordingly *Sears v. Parker*, post 126.—*Dickey v. Hootenpile*, post 358.—*Cupples, guardian of Allen v.* — post 456.—

Foreman v. Tyson, post 496 — *Tyrrell v. Mooney*, 1 *Murph* 401. — *Tate* Sep. 1794. *v. Greenlee*, 2 *Hawks*, 251. But when the lands are not in fact vacant and unappropriated, a state grant of such lands is absolutely void, and that fact may be shown in evidence on a trial at law in ejectment. *University v. Sawyer*, 2 *Hay*. 98. — *Strother v. Carthey*, 1 *Murph*. 162. *Tyrrell v. Mooney*, *Ibid*. 401.

Messrs. Brown, Campbell & Co. v. Daniel Clary and James Craig, Adm'rs. of David Craig.

Under the act of 1789, *Rev. ch.* 814, *sec.* 4, the action is to be brought against both the survivor & the administrator of the deceased joint obligor.

An action had been brought against these Defendants jointly, for a joint debt contracted by the Defendant *Clary*, and the intestate *David Craig*, with the Plaintiffs, pursuant to the act of 1789, *ch.* 57, *sec.* 5. "And where, as it is a rule of common law, that in case of the death of a joint obligor, the debt can never survive against his heirs, executors or administrators, which rule is frequently injurious and oppressive to the surviving obligor or obligors; to remedy which, be it enacted, that from and after the passing of this act, in case of the death of one or more joint obligor or obligors, the joint debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or obligors, as well as against the survivor or survivors; and where all the obligors shall die, the debt or contract shall survive against the heirs, executors and administrators of all the said joint obligors; and in all cases of joint obligations or assumptions of co-partners or others, entered into after the passing of this act, suits may be brought and prosecuted in the same manner, as if such obligations or assumptions were joint and several; any law, usage or custom to the contrary notwithstanding;" and now the jury being empaneled, and before any evidence given, it was objected by *Henderson* for the Defendants—that the act had not so far altered the rule of the common law as to allow the bringing a suit against the survivor and the representatives of the deceased together—by the rule of the common law, the debt would survive against the survivor; unless the act had expressly authorised a joint suit to be brought, it could not be done: the act says indeed the debt shall survive against the representatives of the deceased, but the meaning of that is, that the debt shall survive against them, as it did before the act against the surviving obligor, and that

Vide ex'rs
of Davis
v.
Wilkerson
& others.
post 334.
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Sep. 1794. was against him individually and separately; in the same manner does it now survive against the representatives of the deceased, and gives the Plaintiff his election to sue either one or the other, not both together—and this will become evident by comparing the latter part and the former of this clause together, and by considering what was the rule of the common law before—the latter part directs as to all joint bonds or contracts made after the passing the act, they shall be considered as joint and several bonds and contracts—and what was the effect of a joint and several bond that the act refers to? Why, the Plaintiff might proceed against all jointly, or against each severally, when all were alive, or against any one of the survivors, or against the representatives of each of the deceased severally, when some are dead, or against the representatives of each of the deceased when all were dead—but in no instance could he proceed

(109) against the survivors, and the representatives of the deceased, jointly in one action—neither can be since the act, in case of joint bonds or contracts made after the passing of it. For with respect to them, it gives him precisely the same advantage and no other, that he had upon a joint and several bond or contract before. Now there is no reason to suppose the Legislature intended to place joint bonds or contracts made before the act, upon any other or better footing for the creditor, than those made after. Yet it is evident if the survivors, and the representatives of the deceased, may be sued jointly, that the creditor has a better security upon them; for he cannot do this upon a joint and several bond, where some or all are dead; nor upon a several bond, whether they be dead or living. By such a construction as the Plaintiffs contend for, these joint bonds made before the act, tho' always considered to possess fewer advantages than a joint and several, or even a several bond, will be clothed with an advantage which neither of them possess, of enabling the creditor to bring suit against the survivors, and the executors of the deceased, jointly. And it also subjects the obligee in some instances to greater advantages than if the bond was several, or joint and several; for in either of these cases, the Plaintiff may proceed expeditiously and without delay against any one of the obligors that may be immediately taken—but if the debt survives against all the survivors and representatives jointly, making them all as one debtor, as the contracting

parties themselves were by the rule of the common law, Sep. 1794. then the Plaintiff is not at liberty to proceed against the survivors only, who perhaps may be brought into court, but he must be delayed in his suit until he has run out his process against the others. This act made for the benefit of creditors, certainly did not intend any such thing—by such a construction therefore, if the debt survives against the representatives and the survivors, it subjects the Plaintiff to disadvantages he was not subjected to before; which is contrary to the general intent of the act. If it survives as a joint and several bond, the survivors and the representatives of the deceased, cannot be sued jointly; or if it survives against each severally, they cannot be jointly sued as they are here. But if it is construed to make the debt survive against each severally, then all the inconveniences, and particularly those intended to be removed by the act, are a voided. He may proceed against the representatives, which he could not do before by suing them when they are the real debtors. That injustice and oppression to the survivors (who may be only sureties) that the act complains of, will be obviated—the suit he will then bring will be such a suit as is brought upon a joint and several bond, as the act intended and expressed, and not such joint suit as was never brought upon a joint and several bond—and in case of the absence of one of the parties, he may proceed instantly against the other; & not be delayed by the necessary formality of including both in one writ. And the judgment that the court gives, will be the judgment that has usually been given in such cases, not a complex, informal judgment against some *de bonis propriis*, and against others *de bonis testatis*, which was never known before; and which in many instances, particularly in cases of *devastavit*, or wrong pleading by the executors, and no goods of the testator immediately to be found, would lead to great confusion, and the very same mischief they intended to remedy, namely, a leaving the whole upon the survivor, and an exemption of the testator's estate from its proper burden or proportion in the first instance.

But *per Judge Williams*, Judge *Ashe* assenting—the inconvenience before this act was, that if a man had contracted a debt and procured another to become jointly bound with him as his surety, and then died, the debt survived against the surety only. So where there were

Sep. 1794.  several joint contractors, each of whom were equally benefited by the contract, if one died, the whole debt fell upon the other; and the act expresses, that for the relief of the survivor it was made. This it proposes to do, by making them all equally contributable in the first instance. This produces equality and justice immediately, and prevents circuitry and multiplicity of actions—for as the rule was at the common law, the survivor paid all in the first instance, and then was put to another suit, to get contribution from the estates of the deceased: but now all this is effected by suing them both together. Besides when the debt is first contracted, it is joint, and now it does not become several upon one by the death of the other; but as a joint debt lies upon the representatives: immediately upon the death of the deceased, they instantly step into his place, sustaining the same burthen that he did—then how does the debt become several? Not by any part of this law; and surely the Plaintiff cannot by suing severally upon a joint cause of action, make it to become several by that means. Moreover, it was the relief of the survivor, not the benefit of the obligee, that this act sought for—but it is not an equitable relief to put it in the power of the Plaintiff to exonerate him entirely, and throw the whole burthen upon the estate of the deceased, or *vice versa*. No just reason can be assigned why it should lie upon the estate of the deceased wholly, any more than upon the survivor, or the reverse. As to the difficulty suggested, that no judgment can be entered up in any regular form, the court is always bound to give their judgment according to law; and if there is no precedent to be found conformable to the new law, the court must form one that will be so.—*Et per curiam*, the action is well enough brought.

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NOTE.—Vide *Davis's ex'rs. v. Wilkinson and others*, post 334, see the act of 1797, *Rev. ch. 475*, as to how the judgment in such case is to be entered. An action may be brought against drawer and endorsers of a protested bill of exchange jointly, or against either of them, act of 1796, *Rev. ch. 464*. Suits may be brought against the maker of a promissory note, single bill, bond, &c. and endorsers jointly, or against any one or more of them, act of 1817, *Rev. ch. 937*. Such suits against obligors or endorsers, shall be consolidated, act of 1820, *Rev. ch. 1046*.

Daniel Clary v. Allison.

Whoever has the possession of money, has the property of it. Money deposited by one person to be paid to another upon a contingency, cannot be recovered by that other, but must be sued for by the person who makes the deposit.

The case was, a writ was taken out against *Allison*, Sep. 1794.
 returnable to the County Court of Rowan, and he was
 arrested upon it, and in order to procure *Farborough* to
 become his bail, he deposited in his hands a very consi-
 derable sum of money, and took a note in writing from
Farborough, in which he promised to pay the money to Gov.
Blount, upon the event of *Farborough*'s releasement from
 his suretyship for *Allison*. This writing acknowledged
 the money to have been received of *Allison*. The Plain-
 tiff in the suit was nonsuited for want of a declaration in
 the County Court, and immediately commenced his suit
 again by way of original attachment, in which *Farbo-*
rough was summoned as a garnishee; and upon his oath
 of garnishment, stated the foregoing facts. This latter
 action was brought to trial in the County Court, and
 appealed from this Court: and now the cause coming
 on, it was objected for *Allison*, that by the tenure of the
 writing subscribed by *Farborough*, the money in his
 hands on the event that had taken place, belonged to
 Gov. *Blount*; and that *Farborough* was liable to pay to him,
 not to *Allison*; and should it now be condemned as *Alli-*
son's, Governor *Blount*, being no party to this suit, nor
 bound by any decision made upon it, might sue *Farbo-*
rough and recover notwithstanding. *E contra*, for the
 Plaintiff, it was argued that whoever is in the posses-
 sion of money, is the proprietor, and especially if he
 claim to be the proprietor for his own purposes—that as
 to the writing making it to be Governor *Blount's*, there
 was nothing in it—that writing is a promise to *Allison*,
 upon a consideration proceeding from him (namely his
 depositing the money) to pay to Governor *Blount*; and
 if the promise be broken, the action for the breach must
 be brought by *Allison*—that before the passing of the act
 of *Q. Ann, stat. 3 and 4 c. 9*, and our own act of Assem-
 bly 1762, c. 9. the Plaintiff could not declare upon a
 promissory note; and these acts only enable the holder to
 declare upon such notes as are rendered negotiable by
 them, not upon notes not negotiable; as a note at this
 day for the delivery of a specific article of tobacco, pork,
 &c. and no notes are negotiable by these acts, but such
 as are independent of any contingency; but here at the
 time of making this note, it depended upon a contingency
 whether the money mentioned in it would ever become
 payable to Governor *Blount*, and if it is not a negotiable

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Sep. 1794. note at the time of its making, it can never after become so by any *ex post facto* circumstance. *Et per curiam*, Allison was possessed of this money and used it as his own, and therefore he must be taken to have been the proprietor—whoever is in possession of money and undertakes to dispose of it, is in law the proprietor. *Et per Judge WILLIAMS*, this very point came in controversy at the last term of Hillsborough court in the case of *Quinton v. Courtney*, or *Quintoeh v. Courtney*, and was directed as we are now deciding this question. *Et per curiam*, perhaps it would be very difficult for Governor Blount to support an action upon the promise contained in this writing, for want of being able to shew a consideration.—So the Plaintiff recovered.

NOTE.—As to the first point, vide *Quinton v. Courtney*, ante 40.—Upon the other point, see *Comyns on Contracts*, 1 vol. 27.

State v. Irwin.

Malice aforethought is express or to be implied from circumstances; intent to maim or disfigure, may likewise be implied from circumstances; and it is not necessary to prove antecedent grudges, threatnings or an express design. Confessions before a Justice of the Peace, may be admitted in evidence, although not reduced into writing.

He was indicted, for that he, on such a day and place, made an assault on one *Joshua Coffee*, and of his malice aforethought, struck and put out his right eye with an intent to maim and disfigure, against the form of the act of Assembly, which is in these words, *to-wit*: “If any person or persons shall of malice aforethought, unlawfully cut out or disable the tongue, or put out the eye, of any person, with intent to maim or disfigure; the person or persons so offending, their counsellors, abettors and aiders, knowing of and privy to the offence, shall for the first offence,” &c. and then directs the punishment, making the second offence felony without benefit of clergy. The second clause is in these words: “If any person or persons shall on purpose unlawfully cut or slit the nose, bite or cut off a nose or lip, bite or cut off an ear, or disable any limb or member of any other person, with intent to murder, or to maim, or disfigure such person; in every such case the person or persons so offending, being thereof lawfully convicted, shall be imprisoned for the space of six months, and fined at the discretion of the Court before whom such offence shall be tried.” 1791, c. 8, sec.

1 and 2. *Et per curiam*, malice aforethought is express or implied, and it may be implied from the circumstance of the Defendant's striking with such an instrument as is likely to produce great bodily harm to the person stricken, and from its being done, without sufficient provocation.—Also the intention to maim or disfigure, may be implied from circumstances; and it is by no means necessary to prove antecedent grudges or threatnings, or an express design.—In this case upon the trial, the Attorney-General called upon a witness to swear to a confession made before him by the Defendant, when he came before him to be examined: and *Mr. Moore*, of counsel for the Defendant, insisted that such confession could not be given in evidence; he said a confession before a private individual may be given in evidence, but when it is made before a Justice of the Peace, as in the present case, it is his duty whether it be for felony, or a misdemeanor, to take the examination in writing; and that this is intended as well for the benefit of the prisoner, as the State, to the end that his confession being reduced to writing, when it is made by an officer entrusted by the public in whom confidence is reposed, may not afterwards be liable to misrepresentation in the giving parol testimony of it; and he cited *Leach*, the last case, and the case of the *King v. Jacobs* in the same book. *E contra*, it was insisted for the State, that the practice both here and in England a long time previous to these cited cases, hath been not to admit parol testimony where the examinations of the prisoner were reduced into writing; for then according to the rule of evidence in all cases, that would not be the best testimony the party had it in his power to produce; and it was an absurdity to say, as the cases cited did, that a confession made in the presence of an individual not engaged by duty to be attentive, might be given in evidence, and yet the same confession made before a Justice, whose business it was to examine carefully, shall not.

Et Per Curiam—The practice in this country always hath been to receive such evidence, and we see no good reason to break through it. There is certainly an impropriety in saying, that evidence may be received of a confession made before a private man, and that the same confession made before a Justice shall not, because he hath omitted to perform his duty. This would put

Sep. 1794 { it in the power of a Justice to make the confession, evidence or not, at his election; and is a power the law never meant to give him—the act is only directory, and if the Justice should not do his duty in the obeying it, that shall not be of so much prejudice to the State that the evidence shall be lost by it.—So the evidence was admitted.—*Sec S. Co. Inst.* 62. where malice prepense in cutting out the tongue, or putting out an eye, is thus defined—a voluntarily and of set purpose, though it be done upon a sudden occasion; for if it be voluntary, the law implieth malice.

NOTE.—Vide *State v. Evans*, post 281. That confessions before a Magistrate not reduced to writing are admissible, see *Hall's case*, 1 *McNally*, 40. But to authorise the admission of such confessions, it must be clearly proved that they were never reduced to writing. 1 *McNally* 49, 50.—1 *Leach* 347.

Houser v. Reynolds.

From the day of the date, and from the date, signify the same thing; and according to the intent, are either inclusive or exclusive.

Ejectment. At the last term of this Court this ejectment came on to be tried, and the jury were empannelled and charged: but before any evidence given, *Mr. Williams*, for the Defendant, took an exception to the form of the declaration, which stated the demise to have been made on the fifteenth day of September, in the year of our Lord one thousand seven hundred and ninety-one, to have and to hold from the said fifteenth day of September, for and during the term of five years; and that afterwards, *to wit*, on the same fifteenth day of September, in the year aforesaid, the casual ejector entered and ousted the Plaintiff, who had entered on that day by virtue of the said lease. The exception was, that the Plaintiff had entered and was ousted before the commencement of his lease; he argued, that the words, from the date or henceforth, are inclusive of the day; but from the day of the date, are exclusive; and cited *Co. Litt.* 46. *Bull.* 105, 106, and many other old cases. For the Plaintiff were cited the case of *Pugh v. the Duke of Leeds*, reported by *Cowper*, and *Runnington* on Eject. 85. Judge WILLIAMS was then of opinion, after a very lengthy argument on both sides, that the words from the day of the date, both according to the true acceptation, and more especially according to the legal meaning, are ex-

clusive of the day, and consequently that the ouster was before the Plaintiff's title commenced, and nonsuited the Plaintiff—but next day he granted a new trial, that the Plaintiff might obtain a rule to amend so as to bring on the argument again at the ensuing term, when there would be more Judges present, before whom the point might undergo a thorough examination and become settled: and now at this term, the counsel for the Plaintiff informed the Court, he was ready on the part of the Plaintiff to proceed to the trial of this cause, but as an objection had been taken to the declaration, which if valid, and not to be gotten over either by amendment or by some other means, would render it useless for the Plaintiff to proceed any farther, he desired to have the opinion of the Court upon it; whereupon they directed it to be argued—and the counsel for the Plaintiff insisted that the demise was well laid in the declaration, and commenced on the fifteenth day of September, in the year one thousand seven hundred and ninety-one—the words from the fifteenth day of September, or from the day of the date, were inclusive or exclusive according to the subject matter, and would be interpreted either one or the other as would best answer the intent of the parties—*ut res magis valeat quam pereat*; and this point was so settled in the case of *Pugh & wife, against the Duke of Leeds*, reported by *Cowper*, and recognized by *Runnington*, 85; and though formerly, as many of the old cases will prove, these words in leases were held to be exclusive of the day, yet the rule has been established of late as being incompatible with reason and good sense. In the present case should the old rule prevail, it cannot answer any valuable purpose, but the contrary; and the lease here is entitled to a more favorable exposition than almost in any other case—it is fictitious, not real, for the purpose of trying a title to lands; and to nonsuit the Plaintiff for so trifling a slip, supposing it to be one, would be rather a reproach to the law, than any thing else. If the intent of the parties is the true rule of making these words to be inclusive, or exclusive, as in the case cited it is decided to be, then surely the lessor of the Plaintiff, and his lessee, must be supposed to have intended such a lease as would try the title upon an ouster committed on the fifteenth of September, and consequently a lease commencing on that day.

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Sep. 1794. *E contra*, it was argued that the case of *Pugh & wife v. the Duke of Leeds*, was an exception to the general rule of law, formed by the Court in that instance to get over the piece of manifest injustice that would have been operated by adhering strictly to the old rule. That was a lease made under a power, as a provision, for an only daughter, and had it been adjudged to have been a lease in reversion (as it would have been, had the words from the day of the date been held to be exclusive) it would have been wholly void under the power; but here it may be construed to commence after the 15th, and yet be a good lease. It is made pursuant to a power which says it shall be void if made in reversion, and though the Court in that case, cited and examined all the old authorities, and seemed to overrule them on account of their inconsistency and incompatibility with each other, yet it is observable that in this point they were all uniform in agreeing, that from the day of the date is exclusive. *Curia advisare*.—And after some days delivered their opinions:

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Judge WILLIAMS—I was present at the last term, and I was then very strongly of opinion, that from the day of the date, was exclusive, but I have since altered that opinion. In law there is no fraction of a day—date signifies, the day on which an instrument is delivered; and to say from the date, is the same thing as to say from the day of the date, and from the date is inclusive—from henceforth, is inclusive—but it can only mean from this day when the instrument is delivered; therefore from henceforth, from the date, and from the day of the date, must all mean the same thing; and the first of them is admitted, on all hands, to be inclusive.—Judge ASHE—From, is either inclusive or exclusive, as intended by the party at the time of making it—from such a town to such a town, in respect of distance, must mean inclusive; otherwise in the computation of distance, the space that these towns occupy will not be computed at all. It is so used in holy writ, “From everlasting to everlasting thou art God.” So also in poetry,

“Great Jove laughs from his imperial throne—

“To hear the mortals boast of prowess not their own.”

Moreover the case cited from *Cowper* was intended to form a general rule, and to settle the law for the future; and is peculiarly recognized in *Runnington* as settling

the law in cases in ejectment, and establishing the antient distinction between the terms from the date, and from the day of the date.—*Et per curiam*—The declaration is sufficient. Sep. 1794.

NOTE.—In the argument of this case, it was argued, that the words coming after the "*Scilicet*," where the ouster is described, should be rejected, and the word "*afterwards*," only retained. In which case it would read thus, to have and to hold from the said 15th day of September, for and during the term of five years, and afterwards the casual ejector entered—omitting the words, *to wit*, on the same fifteenth day of September, in the year aforesaid; and for this were cited *Bull. Nisi Prius* 106. [*Cro. Jac.* 96.] and some cases from *Espinasse*; and also that omissions in a declaration in ejectment, are amendable—and authorities were cited to this point; but the Court being of opinion for the first point made in the argument, they gave no opinion on these.

NOTE.—Vide *Adams on Ejectment*, note to page 199, where the case of *Pugh v. Duke of Leeds*, *Cowper* 714, is considered as decisive of the question agitated in this case.

Hamilton v. Dent.

Words in an action of slander bear that signification, which they have in common parlance; therefore to say one has sworn false in Court, implies malice, and, also in this country, must mean such a Court as has power to administer an oath; and it is therefore actionable.

Action for words, in which the declaration stated that the Defendant maliciously spoke of the Plaintiff these words, "You swore false in two particulars in one oath in Court;" then it went on, and that afterwards, *to wit*, the same day and year, he spoke these other words, "He swore false in two particulars in one oath in Court," meaning the County Court of Guilford, which is a Court of record. Upon the general issue pleaded, the jury found generally for the Plaintiff, and assessed his damage to sixty pounds: and thereupon *Moore*, for the Defendant, moved in arrest of judgment, and assigned these as his principal reasons, *to wit*, that the words in the first count are not actionable, and that those in the second are not laid to be spoken maliciously or with any ill motive. There were other reasons assigned, but he seemed to rely upon these only, and these reasons come on now to be argued. (117)

Moore for the Defendant—Every declaration ought to be plain, that the Court and the jury may understand it; brief, that the records of the Court may not be entangled with unnecessary matter; and certain, that the Defendant may know precisely what to defend himself against.

Sep. 1794. and that he may plead it in bar to subsequent suit for the same cause; and it ought to be certain matter, which in law will support the action—to charge a man with false swearing, does not necessarily imply that he was perjured, & for that reason has been held always not actionable; as to say of a man that he is foresworn, which may be in common conversation, or not in a Court of record, in which case the false swearing cannot amount to perjury—the same thing is it to say he is foresworn in Court, meaning a Court which had no jurisdiction to administer an oath. He cited 4 *Bac. Ab.* 483, 484. 4 *Rep.* 15. *Cro. El.* 429, 788, 905. *Yelverton S. C. Danver's Ab.* “Your brother took a false oath,” held not actionable. As to the second count, if that be bad, though the first be a good count, as damages are assessed generally, and the Court cannot know whether they were assessed upon the good or the bad count, the whole is vitiated and no judgment can be given; and this second count states no such matter as is sufficient to support an action; it states words spoken without saying they were spoken maliciously, without which circumstance they are not actionable. 3 *Bl. Com.* 124, 125. 4 *Bac. Ab.* 515. 4 *Rep.* 17. *Cro. Car.* 443. *Cro. El.* 334. *Cro. Jac.* 126. *Cro. El.* 496, 497. 10 *Rep.* 139. 2 *Bl. Rep.* 750. The words laid in the second count may be true, and yet not amount to a charge of perjury. 4 *Bl. Com.* 136. 1 *Hawk. P. C.* 172.

(118) *E contra*, it was argued, that the rule as to actions for slander is considerably changed at this day from what it was formerly. In antient times there were two rules which principally governed these actions, namely, that words were to be taken in *meliori sensu*; and secondly, that they must be such as if true the Plaintiff was liable to be punished criminally. As to the first of these rules, it is now exploded; and as to the second, if the words are such as according to common acceptance, are expressive of a charge that would render a man liable to punishment, the action will now lie: and even where the words are defamatory, though not containing a criminal charge, an action hath been held to lie. It was antiently the policy of the law to discourage actions for slander, *ad obviandum malitiæ hominum*, as the old books expressed it; but in modern times, the action has been encouraged to prevent breaches of the peace. But even

according to the ancient authorities, this action would lie for such as words are stated in the declaration, much more will it lie by the modern authorities. According to the old cases, to say a man was forsworn in a Court, implying such a Court as had a right to administer an oath in a judicial proceeding, was actionable. He cited *Cro. El.* 185, 135, 297, 609, 394. *Cro. Car.* 288, 322, 387, 378, 509. *Luter.* 538. The rule at this day is, that words intended to defame, and calculated to effect that purpose, are actionable, contrary to the rule laid down in 4 *Rep.* 15, *b.* and he cited *L. Ray.* 960. *Cow.* 278. *Salk.* 695. Moreover the declaration states that by means of speaking the words, the Plaintiff could not be elected a representative in the House of Commons for the county of Guilford, as he had been before for several years; and the jury have found this allegation as well as every other part of the declaration to be true. As to this, the rule is, that though the words spoken be not of themselves actionable, yet if they are followed by special damage, the action will lie. The loss of his election, which would have been honorable to the Plaintiff, is a special damage. He cited *Cro. Jac.* 323. 4 *Rep.* 17. *Cro. El.* 346. *Salk.* 693. *Bull.* 6 and 7. What is called the second count in this declaration, is not so; it is only a laying the words another way in the same count, and the whole declaration is but one count; and if in the same count, some words be actionable, and some not, and damages be entirely assessed, after the verdict they shall be intended to have been assessed for the actionable words. He cited *Bull.* 8. *Cro. El.* 237. 10 *Rep.* 130 to *Osborne's* case 131. *Cro. Jac.* 630. *Cro. El.* 329, 788. *Cro. Car.* 328. 1 *Salk.* 119. 2 *Cro.* 598. But granting that this is a second count, as the Defendant's counsel insists it is, yet the word maliciously, is not of necessity to be inserted. 1 *Term. Rep.* 11, or *Durnford* and *East* 11. The rule is, where the words themselves are such as imply malice, there it need not be stated they were maliciously spoken; but where they are such as may reasonably be supposed to have been spoken without malice, as if spoken on a necessary occasion, or in a confidential way intended for the benefit of the hearer only, there they must be laid to be spoken maliciously. As if a man enquire of the character of a servant of his former master, and he gives him a bad character; here the bad character may be reasonably supposed to be given with

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Sep. 1794. intent only to inform the enquirer truly of the Plaintiff's character, to answer his request, and without any malicious motive towards the Plaintiff; and in such case it is the speaking the words with malice, that only will make him liable to the action, and it ought to be laid that he spoke them maliciously. So of every other case where it may reasonably be supposed from the occasion, they were spoken with no ill intent to the Plaintiff, the malice of the speaker is the only circumstance that can turn the scale against him, and it must be expressly stated in the declaration and found by the jury. But it is equally true, that this circumstance need not be alledged in any case where the words themselves manifestly shew the evil design of the speaker. But suppose that word necessary, yet now since the jury have found a verdict against the Defendant, it must be presumed they were spoken maliciously, as otherwise under the direction of the Court they could not have found for the Plaintiff; and the defect in the declaration, supposing it to be one, is remedied by the verdict. *Bull. Nisi Prius* 321, 220. *Salk.* 9. *L. Ray.* 109, 811, 1214. 4 *Burr.* 2020. 2. *Mod.* 213. 3 *Mod.* 162, 258. He concluded with praying judgment for the Plaintiff.

(120) Mr. Moore in reply—The Judges have not the power to declare any thing to be law, but that which is so declared by the Legislature, or established as the common law as found in the books of reports—to say they are not bound down by former decisions establishing, or rather ascertaining what is the common law, is to place the property of all the citizens in the arbitrary and capricious dispositions of the Judges. These old cases were undoubtedly considered to be the common law, and the Judges in England had no power to alter it by their modern decisions—some of which say there is no rule to be observed in such cases, but the understanding of the Judges—establishing a doctrine dangerous to liberty in the extreme. According to this principle, no man knows nor can know until he hears the sentence of the Judge, what words he may speak with safety—one set of Judges may entertain one opinion, another set of them a quite different opinion. There should be some certain rule in this as well as in all other cases, from which the Court should not depart; and this is found in the books of reports ascertaining what the common law was before our revolution, and which is declared by our Legislature to

be in force here. The common law, as modified and changed by decisions made to suit the circumstances of the people of England since that period; or perhaps from other motives less commendable, and which are handed to us in the modern books, are not the law that is referred to by our acts of Assembly; they have adopted the common law as it was at the time of making the acts, and as it had been received here formerly. This is the law by which our Courts are bound, and they must ascertain it by the cases adjudged before these English innovations took place. *Curia advisare vult.* And now on the last day of the term they gave judgment for the Plaintiff. Sep. 1794.

Judge ASHE—According to the old authorities words are to be taken *in meliori sensu*, to discourage actions for slander; but now the rule is changed, and they are to be taken to have that signification which they bear in common parlance; and taking them in that sense, in the present case, they clearly impart a charge of perjury.

Judge WILLIAMS—The old authorities say, that the words spoken must be such as impute a crime punishable, yet there are many of these old cases where actions of slander have been maintained without the assistance of this rule—as to say of a young lady, you went to such a place to drop your stink; and besides, the old authorities cited on the part of the Defendant go to this, that if the words were foresworn in such a Court, mentioning it, and that appears to be such a Court as could administer an oath, it sufficiently implied a charge of perjury to support the action—but if they only charged him with being foresworn in Court, they would not support the action. The reason of this difference is, that in England there are many Courts which have no power to administer an oath, and if an oath should be administered, and the party swear falsely, it was not perjury according to the authorities cited from 4 *Bl. Com.* 136. 1 *Haw. P. C.* 172, and the Court would not intend the speaker of the words meant such a Court as could lawfully administer an oath, when he had not expressly named such an one; because another rule was, that words were to be taken *in meliori sensu*. But these reasons will not apply here—there are no Courts in this country, of course none in the County of Guilford, but such as by law may legally administer an oath; the Orphan Court has been singled out as one that cannot ad-

Sep. 1794. minister an oath; but I think the Orphan Court may legally administer in regard to such matters as are within their jurisdiction. It will follow therefore, that to say a man swore false in Court in this country, is the same thing as to say, he swore falsely in a Court having power lawfully to administer an oath to him, and by the old authorities themselves such words would support an action amounting to a charge of perjury.

Et per curiam.—Let the Plaintiff have judgment, and it was entered accordingly.

NOTE.—Vide *Browne v. Dula*, 3 *Murph.* 574. *Holt v. Scholefield*, 6 *Term Rep.* 691.

James Conner v. Gwin's Ex'rs. A case in Equity.

A negro, whose life was forfeited to the public for murder, was sold under execution, without that fact being then known. A bill in Equity by the purchaser praying to stand in the place of the judgment creditors, for the amount of the purchase money was sustained by the Court.

The bill stated, that two executions being writs of *fi. fa.* issued from the County Courts of Mecklenburg and Iredell, at the instance of different Plaintiffs, and were levied by the Sheriff on the property of the testator in his lifetime, and particularly on a negro fellow named —; and that the property was advertised for sale—that before the day of sale, this negro privately murdered the testator, and that on the day of sale the perpetrator of the murder had not been discovered. That this negro was sold on that day, and purchased by the Plaintiff for a sum of money amounting to the judgments, which he paid in discharge of them. That afterwards it was discovered this negro had committed the murder, whereupon he was tried, condemned and executed; and the bill prayed that as the life of the negro was in fact forfeited to the public, at and before the day of sale; and that as an action at law could not be supported by the Plaintiff against the executors, that this Court would decree him to stand in the place of the judgment creditors, and to be considered in the light of purchaser of the benefit of their judgments, so as to have the estate of the testator, as to the amount thereof, subject in the same manner it was at the time when the money was advanced by him. The Defendants demurred to this bill for want of equity, but agreed that if the opinion of the

(122) Court should be against them on this point, they would

not further contend against the Plaintiff, as the facts stated in the bill were true, but would submit to such decree as the Court thought proper to make. Oct. 1794.

And now this cause came on to be tried, and the demurrer being argued :

Per curiam. Judge ASHE and Judge WILLIAMS, we are clearly of opinion that the facts stated are proper for the jurisdiction of this Court, and if true, that the Plaintiff is entitled to relief agreeably to the prayer of this bill. Whereupon a decree was entered accordingly.

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Flowers v. Glasgow.

On demand, previous to bringing detinue, Defendant acknowledged, that the negroes were in his possession. Proof, that he had given one of the negroes to his son-in-law, who was in possession of him at the time of the demand, shall not prevent the Defendant's liability to the action.

Detinue. This cause now came on to be tried upon the general issue, and the proof of the demand made by the Plaintiff previous to the institution of his action was, that Plaintiff demanded the negroes (*James and Dempsey*) of the Defendant, who acknowledged they were both in his possession, and said he should not deliver them ; and that this demand was in January or February, 1787. The Defendant then proved, that two years before that period he had given *James* to his son-in-law, *Mr. Williams*, and had at the same time given him possession, which he had continued ever since ; and that the negro *James*, in January and February, 1787, was in *William's* possession.—It was argued by General *Davie*, that *Glasgow*, as a parent, was willing and intended to undertake the defence of the action himself, and his acknowledgment must be taken as evidence to that amount. *Et per curiam*, ASHE and WILLIAMS—The evidence must be so understood ; and they directed the jury that this evidence was sufficient proof of the possession having been in the Defendant at that time ; but the cause for another reason, was adjourned.

NOTE.—Judge WILLIAMS said in this case, upon another part of the argument, that he should yield to the decision in the case of *Tinnes* and *Potter*, until it should be contradicted by a more full decision to the contrary. It was decided by two Judges, ASHE and SPENCER, against his opinion.

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Allen's Ex'rs. v. Mountfort Stokes.

A plea to the jurisdiction of the Court under the act of 1793 Rev. c. 392, is to be decided as to the amount for which the suit is brought, only by the writ and declaration.

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Debt. The bond was for one hundred pounds, but reduced by payments, as the Defendant alledged, to about thirty pounds; he pleaded to the jurisdiction of the Court according to the act of 1793, c. 19, which directs that from and after the passing of this act, no suit shall be originally commenced in any of the Superior Courts in this State for any debt or demand of less value than one hundred pounds, where the Plaintiff and Defendant lived in the same district; or for less than fifty pounds, where the parties lived in different districts; and if any suit shall be commenced contrary to the true intent and meaning hereof, or if any person shall demand a greater sum than is due, on purpose to evade this act; in either case, the Plaintiff shall be non-suited and pay costs: and the Defendant set forth in his plea, that the real and true demand of the Plaintiff was of less value than fifty pounds; to which plea there was a replication and issue. *Et per curiam*, Judge ASHE and Judge WILLIAMS—This is an issue to be determined by the Court, and that the writ and declaration was proof of the amount of the Plaintiff's demand, and as the sum demanded in the writ and declaration was above the sum of fifty pounds, they ordered a *respondeas ouster*. *Quere de hoc*.

NOTE.—Vide *Sur. Part. of McNaughton & Co. v. Hunter*, post 454. *Bell v. Bell*, 1 Mur. 95. *McGhee v. Draughon & Jordan*, 2 Car. Law Rep. 260.

Christmas and others v. Campbell and others.

An affidavit of an agent, not a party in the suit, cannot be annexed to an answer to dissolve an injunction. But an order may be made to have the fact, which the affidavit was intended to show, tried by a jury at the next term.

Catlett Campbell and his partners, merchants in Petersburg, recovered a judgment on debt in the Superior Court here last term, against *Christmas* and his partners; and since the last term, the Defendants filed their bill in equity, and obtained an injunction. They stated in the bill that when they gave the bond, *Campbell* promised not to sue them upon it, and that they were induced to confess the judgment by *Mr. Tatom*, the agent for *Campbell & Company*; who promised them, that if they

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would each pay their proportion of five hundred dollars, on or before February then next, execution should be stayed for the residue till they could sue and recover the amount from their debtors. *Campbell* by his answer, denied that he had promised not to sue upon the bond as they had stated; and as to the promise of his agent, denied that he believed it to be true, being informed to the contrary by his agent, who he believed had given him true information; and he further stated in his answer, that as to the said promise stated to be made by his said agent, that the agent not being made a party to the bill had no opportunity to answer, but that he had made his affidavit contradicting that part of the bill which related to his promise, and prayed that the same might be taken and received as part of his answer. This affidavit was accordingly appended to the answer, and fully denied the promise alleged in the bill to be made by him to the Defendants at law.

Moore for the Defendants, insisted that this affidavit was *ex parte*, and could not be received as part of the answer; and cited a case adjudged at Halifax, where a number of affidavits were annexed to the answer tending to disprove the facts stated in the bill, and were rejected by the Court; and he insisted in like manner, that the affidavit annexed in the present case might not be read.

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E contra—The counsel for the Defendant to this bill insisted, that the case at Halifax was not such an one as ought to be received as a precedent; he remembered that case very well—that the objection there was taken by *Mr. Moore*—that there was not argument on the other side—and that it ought to be considered as a case that passed *sub silentio*. He said the objection now taken, of its being *ex parte*, was not a sound one, for the answer of the Defendant was *ex parte*—there was no cross examination, and the only security for its truth was his being liable to prosecution if he swore untruly, and that there was the same security in the case of the affidavit—he that makes it, is also liable to be prosecuted if he swears untruly. Injunctions may be granted upon affidavits taken *ex parte*. 1 *Eq. Ca. Ab.* 285. s. 6. 2 *Eq. Ca. Ab.* 522. s. 2. 14. s. 2. It may be also continued upon affidavits against the answer, though that be full and deny all the equity of the bill. 3 *Will.* 255. In some cases, an injunction may be granted upon affidavit only without a bill, or before it is filed. 2 *Fern.* 401. 3 *Ba. Ab.* 175.

Oct. 1794. in which case it was granted before bill filed, which undoubtedly must have been upon affidavit; also, 2 *Eq. Ca. Ab.* 527. If then an injunction may be continued on affidavits contradicting the answer taken by the complainant *ex parte*, it would seem to follow that affidavits contradicting the bill may be taken *ex parte* to dissolve the injunction, and this is the only use we wish to make of the annexed affidavit; and it seems to be peculiarly proper in a case circumstanced like the present, where it is impossible for the Defendant to give any positive answer to the whole of the bill, part of the matter charged therein having been transacted with his agent in his absence, and that agent not made a party. At this rate, any foreigner may be delayed of the fruits of a judgment recovered in our Courts *ad infinitum*; since they generally obtain their judgments by the agency of an attorney at law, or attorney in fact; the Defendant at law then has nothing more to do, than to state an agreement like that stated in this bill, with the attorney for the Plaintiff, taking care not to make him a party, and as the Plaintiff at law, cannot in the nature of things say positively that the fact was not as stated, the injunction must be continued. Besides when the debate is about the continuance or dissolution of an injunction, all that the Court can enquire of, is, whether there is enough to satisfy them appearing in the cause, to say, that the judgment at law was not unconscientious; and of this they may be as well satisfied by hearing the affidavits of others as the affidavits of the Defendant himself. If the doctrine advanced on the other side be received here as the rule of a Court of equity, no injunction can ever be dissolved on the coming in of the answer, where the principal fact is alleged to be transacted or promised by the Defendant's agent; and a bill in equity will come to operate almost as a bar of the demand of the Plaintiff at law—For instance, in the present case, can this injunction be dissolved at all but upon a hearing of the cause upon depositions being taken, and the cause regularly set down and heard? And it is a well known fact, that at this time there are a great number of bills now in this Court, prior in time to the present bill, of ten years standing and upwards—the Plaintiff at law had better abandon his debt than be delayed and vexed so long.

Per curiam, Judge ASHE and Judge WILLIAMS—The Defendant here, it is true, has denied in positive terms

that he agreed not to sue this bond; but as to the other part of the bill, stating an agreement by the agent that if the Defendants at law should each pay his proportion of 500 dollars before February then next, that execution should be then stayed until they could collect the residue of the debt from their debtors, this he has not positively denied; he says only, he does not believe any such agreement was made; and indeed, not being present when this judgment was obtained, he could not positively deny it—therefore it remains unnegatived, and the injunction must be continued. The affidavit annexed, of the agent, Mr. Tatom, cannot be read, he not being a Defendant to this bill; and indeed he could not be made a Defendant, not being interested in the judgment. Had he been made a party, he might have disclaimed any interest or concern therein, and the bill as to him would have been dismissed with costs; and his affidavit cannot be received, because it was taken *ex parte*, and for want of cross examination may appear in a different dress now from what it would appear were he cross examined by the complainants, who might suggest matters that he would recollect, and which for want of such suggestion, he might not remember. This we have decided over and over again; but we will make an order, that the unnegatived fact shall be tried by a jury at the next term.—Let the injunction be continued, and make an order for the trial of this fact at the next term; which was done accordingly.

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NOTE.—That *ex parte* affidavits cannot be received to support an injunction. Vide *Leroy v. Dickinson* and others, 1 *Car. Law Rep.* 497.

Sears v. Parker.

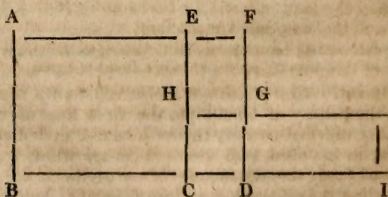
Grants from the State cannot be avoided for any cases, in any other manner, than by proceedings in a Court of equity.

Ejectment. *Henry Eustace McCulloch* had a tract of land in the county of Randolph, the first line of which began at a marked corner, thence a course and distance called for in his deed, and a second corner which was also marked; but the distance from corner to corner, was greater than the distance mentioned in the deed; then the deed called for a second line, mentioning the course and distance, and a stake as the point of its termination. It was not marked, nor was there any stake to be found. In like manner the deed called for the third and fourth lines, describing their courses and distances. These

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were not marked. He had also a second tract adjoining this, beginning at the stake, the third corner of the first tract, being the termination of the second line; from thence the course of the said second line of the first tract was continued. The deed called for a marked corner as its termination, which was found; but at a distance from the stake much greater than that called for in the deed. The deed next called for a line of the same course with the third line of the first tract, but only half the distance of the said third line; thence by a line parallel to the first line of the second tract, calling for a corner at the intersection of the third line of the first tract. *Sears* had obtained a state grant for the land adjoining the other half of the third line of the first tract, but the surveyors appointed to run those tracts of *McCulloch*, previous to their being sold as confiscated land, had begun at the second corner of the second tract, and had run it by courses and distances; they then extended the second line of the first tract to the third line (as they surveyed it) of the second tract, being the fourth or concluding line from the beginning stake mentioned in the deed. This made the distance of the second line of the first tract much greater than the distance called for in the deed, and of course the third line of the first tract drawn from thence, would include the land taken by *Sears*; but if the second line of the first tract should terminate at the completion of the distance mentioned in the deed, and the third line of the first had been run by its course and distance from thence, then it would leave out the land taken by *Sears*.

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B C represents the course and distance of the second line of the first tract. **B D** represents the second line of the first tract, as run by the surveyor to make it adjoin to the line **D G**, being the third line of the second tract, as run by the surveyor by courses and distances from the

corner I. Should the third line of the first tract be run from the point C, the distance and course called for in the deed, it would form the line C H E, and leave out *Sears's* land, lying between the lines E H and F G; but if the distance of the second line be disregarded, and that be extended to the line of G D as laid off by the surveyor, and the third line of the first tract be run from the first point D, then *Sears's* land is included. These two tracts were sold as confiscated property, and were described in the deeds granted to the purchasers as run by the surveyors, that is to say—the first tract was bounded by the line D F, and so included *Sears's* land. Oct. 1794.

The Counsel for *Sears* insisted, that where a deed calls for a course and distance, and there be neither a marked corner nor a natural boundary called for, that the line must of necessity stop where the distance called for in the deed is completed; and in the present case, that is at the point C, and that is the beginning corner also of the second tract; consequently the line C E is the third boundary of the first tract, and not the line D F, and consequently also *Sears's* land is not included either in the first or second tract of *McCulloch*.

E contra—It was argued by Mr. *Moore* for the Defendant, that old surveys ought to have a reasonable allowance made, since in almost all of them the lines are too long; the first line of the first tract in the case now before us, is a marked line, and too long; if we allow the same measurement in the second line, that proportion will carry the second line beyond the point C and even to D, and then the land entered by *Sears* and granted to him by the State, was not vacant land at the time of his entry. Secondly, he argued, that the deed granted by the State to the purchaser of this confiscated property, expressly included the land now contended for by *Sears*; and supposing it to have been vacant land, not included in either of *McCulloch's* tracts, yet having been granted by the State to the purchaser of the confiscated lands, prior to *Sears's* entry and grant, the State could not afterwards grant it to him, and so *quacunque via data*, *Sears* is not entitled to recover. (128)

Counsel for *Sears* in reply—The deed to the purchaser of the confiscated lands, expressly states that this land was sold as the land and estate of *Henry Eustace McCulloch* confiscated by the Legislature; which makes it evident that no more was intended to be conveyed

Oct. 1794.  than the land which had been the property of *Henry Eustace M'Culloch*; and if by mistake or design the boundaries had been extended beyond what his grant covered, that mistake was to be rectified by the express words of the State grant, saying the State conveyed it as his land; for whether it was his land or not was to be ascertained only by his grant, not by the description of the State grant to the purchaser; and upon inspection of *M'Culloch's* deed, and by running the land described therein by course and distance, where there is no marked line, we are ascertained that the land now claimed by *Sears*, is not any part of the lands formerly granted to *M'Culloch*, and as his to the purchaser of it as confiscated. Moreover the laws of this State gave authority to the Commissioners of confiscation to sell only such lands as had been appropriated, and belonged, and were legally secured to such persons as had incurred the penalty of confiscation, not those lands that were vacant and never had been appropriated individually—for the disposal of these, other officers were appointed under the laws, for entering vacant and unappropriated lands. The officers appointed to dispose and make conveyances for these several descriptions of land confiscated, and vacant lands, were in the nature of attornies constituted by individuals, to sell lands for their principals; with regard to whom it was a well known rule of law, that if the attorney exceeded his powers, whatever he did beyond them was void, as being done without authority. Suppose an individual appoints two attornies, one to sell one tract, and another to sell another tract adjoining; and the first sells the tract he was empowered to sell, and part of the adjoining tract, which the other only was empowered to sell—surely the sale would be void as to such part of the second tract as he had not been authorized to dispose of. So here, the Commissioners of confiscation were empowered to sell *M'Culloch's* tract, the Entry-taker for the County of Randolph, is empowered to sell the vacant and unappropriated land adjoining; and is not the sale of this vacant land made by the Commissioner void, as having no power to intermeddle with it? If not, I would be glad to know, for I cannot with my utmost exertion discover the distinguishing mark that differs the case of these officers from that of the attornies of individuals. It seems to me, the rule of law is the same in both cases, and ought to be adhered to in

the present case, more especially as the Entry-taker, the proper officer, having lawful authority to sell has executed his power by receiving the purchase money for the public, and issuing his warrant for the surveying this vacant land for the purchaser *Sears*, according to the laws of the country. It has been hinted by the Counsel for the Defendant, and indeed it must be acknowledged, that the Court in some instances formerly have decided, that a State deed cannot be avoided either in all or in part, upon evidence on a trial in ejectment, for the danger that would ensue to purchasers if their deeds could be avoided by parol evidence given to a jury.—With great deference to the Counsel on the other side, and to the former opinions of the Court, I must say, that I have considered of this position with the most anxious attention, and viewed it in every light which my imagination could place it in, and I could never attain to any view of the subject that could give it the appearance of consistency with the rules of law. Suppose a Commissioner of confiscated property, or an Entry-taker, had sold to A. who paid the purchase money, and the Governor and Secretary by mistake had made out and executed a state grant to B. and afterwards had made out and executed a deed to A. shall not A. be suffered to shew this mistake upon a trial in an ejectment brought against B. to recover the land? Suppose the Governor and Secretary had been deceived into this measure by fraudulent and false representations of B. shall not this fraud be shown upon a trial in ejectment, and the deed to B. avoided? Suppose the warrant of survey as made by the proper Entry-taker, the certificate of survey, and the plat annexed shall be falsely made out and returned to the Secretary's office, and by that means a grant procured in the name of the forger, or any other person, to the prejudice of a fair purchaser who afterwards obtains his grant, shall he not be suffered to prove all this upon a trial in ejectment? It is argued, that this must be done in a Court of equity—but why? I apprehend this doctrine is grounded upon a mistake of what is said in many books respecting the powers of a Court of Chancery to repeal letters patent improperly granted, or obtained upon misrepresentation or deception. If we attend to the different construction of the Court of Chancery in England, and of our own Court of equity in this country, the mistake will be discovered. The Court of Chan-

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Oct. 1794. cery in England exercises a common law jurisdiction with respect to the repeal of letters patent, and also an equity jurisdiction altogether distinct from that, upon a bill filed for that purpose. Their jurisdiction with respect to the repeal of letters patent is limited, and directed by the settled and known rules of the common law. 3 *Bl. Com.* 47, 261. Now our Court of equity is not vested with this power, it possesses only all the powers and authorities within its district, that the Court of Chancery, formerly held in this State under the late government, used and exercised, and that are properly and rightfully incident to such a Court, agreeably to the laws in force in this State, and not inconsistent with our present constitution; provided no final decree shall be passed by such Court, but where two of the Judges at least are present. 1782. *ch.* 11. s. 2. This vests in the Court of equity here such powers, and these only as the Court of Chancery in England exercises on the equity side of the Court. All the subsequent parts of the act cited, are directed and confined to process, powers and proceedings that were used on that side of the Court of Chancery in England, and speaks of none others. So that the whole texture of our act shews, that our Courts of equity are empowered to proceed by bill, not by *sci. fa.* The Court of Chancery in England, on the equity side, also proceeds by bill, answer and depositions; but on the law side, and so far as regards the repeal of letters patent, it proceeds according to the rule of the common law. 3 *Bl. Com.* 47, 49. *Wood's Inst.* 479. 4 *Inst.* 79 to 81. 1 *Str.* 146. 1 *Eq. Ca. Ab.* 127. and this power has never yet been vested, by any act of the Legislature in our Court of equity. It has no power therefore to proceed by *sci. fa.* to repeal the grants of the State, as the Court of Chancery in England hath. The same reasons which rendered it proper there, that the Chancery should exercise that power, do not by any means apply here. The Chancellor has the possession of the great seal, which is necessary to give validity to these grants, and the records of them are preserved in his custody, and he for the most part knowing the suggestions upon which the grants issued, he is the proper officer therefore to be entrusted with the charge of detecting mistakes and rectifying them—he can perform this task with more effect than any other, and he can vacate the record of the grants improperly issued, these records

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being within his immediate power; but what would be the consequence of an attempt on the part of our Court of equity to exercise this power? Can this Court govern itself by the rules of the Court of Chancery in England, when proceeding with the same object in view? If their rules will not apply here, then our Court must either frame new ones, which I apprehend it has no authority to do, or must relinquish its jurisdiction entirely. The Chancellor in England issues his *sci. fa.* returnable either before him in his Court of Chancery, or into the King's Bench; when returnable before himself, the party either suffers judgment by default, or demurs, or takes issue; in the two former cases, the Chancellor gives judgment; in the latter, he sends the issue into the King's Bench to be tried. *Dyer* 197. 1 *Mod.* 27. *Latch.* 3. 3 *Lev.* 220. *Cro. Jac.* 12. 6 *Mo. Rep.* 229. 4 *Inst.* 72. 80. There is no bill filed against the Defendant, he is not required to answer on oath and discover; the issue is tried upon evidence as other common law issues are. How will our Court of equity proceed—will it issue a *sci. fa.* and send the issue to themselves, to be tried before themselves as common law Judges by a jury? What need of all this circuitry? Or will they proceed by bill, answer and deposition, leaving the chancery course of proceeding and mode of trial altogether? This will be entirely new, and the first precedent either here, or in England, from whence our laws are borrowed. If we proceed by pleading to the *sci. fa.* and making up an issue, cannot a jury upon the trial of an ejectment, under the direction of the Court, do the same law and justice as if they tried it upon an issue made up in the pleadings to a *sci. fa.*? And after all, will not the evidence upon this issue be parol evidence, to shew the mistake, misrepresentation or deception in the same manner precisely as upon the trial of an ejectment? Where is the evil avoided then, or the advantage attained, by trying it upon a *sci. fa.* that may not be equally avoided or attained by trial in ejectment? The usual and ordinary method observed in England, is for the party injured to apply by petition to the King, for leave to use his name for repealing the letters patent. 3 *Bl. Com.* 261. This perhaps may not be absolutely necessary, but if it be, who is to give that leave here? Has the State thought proper to vest that power any where? If the injured party can institute process without any leave, then why not institute an ejectment as well as a bill in equity? Where is the law of the

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Oct. 1794. country, or any scintilla of legal reason, to determine to the latter rather than the former? The form of the judgment on a *sci. fa.* in England is, *Quod predictæ literæ patentés dicti Domini Regis revocentur, cancellentur, evacuentur, adnullentur, et vacuæ et invalidæ pro nullo penitus habeantur, et teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur et adnihiletur, &c.* and then the Chancellor damns the enrolment thereof, by drawing strokes through it like a lattice, 4 *Inst.* 88, and for this purpose the letters patent themselves are recalled into the place from whence they issued, that is, into the chancery, that they may be cancelled. 1 *Stra.* 451, 8 *Rep.* 31, 35.

The judgment in the ejectment will indeed only be, that the Plaintiff recover, without saying that the patent shall be recalled, and that together with the enrolment in the Secretary's office, cancelled. But can the Court of equity say this in their decree? I believe there is no precedent of such a decree having ever been pronounced by any Court of equity or chancery that ever set in this country; if there has been any such, we have a right to challenge the production of it. Indeed cases may exist, where a Court of equity, proceeding by bill and answer, would be found totally incompetent to afford any relief. Suppose the patent be obtained by some fraud or deceit, that would subject the patentee to a forfeiture, or to a criminal prosecution; if it be obtained, for instance, by means of a forgery, of a warrant of survey and return, as before suggested, or be transmitted to the Secretary by fraud between the Entry-taker and patentee, to the prejudice of a third person, shall he file his bill against them, and compel the Defendants to answer to the fraud or to the forgery charged upon them? Shall they be compelled to subject themselves to forfeiture or punishment? And if they shall not be compelled to answer, what advantage is there in proceeding by this mode, rather than that of an ejectment? Nay, more—if he is not compellable to answer, the Plaintiff's bill must be dismissed. This Court will find itself incompetent to afford redress, in the most gross and flagrant instances of fraud, and the party injured must either be permitted to seek and obtain his remedy at law, or remain without any remedy at all; and if suffered to proceed at law, he must do that by some other means than that of a *sci. fa.* to repeal the grant; for the Supreme Courts of law in

this country, can only exercise such powers as were exercised by the former Judges in this country before the revolution, or more properly speaking, they cannot exercise greater, 1777, c. 2, s. 2, and the Superior Courts in this country could never exercise greater powers at any time, than the Judges of the King's Bench in England, 1768, c. 1, s. 2, except in some few instances upon subjects of ecclesiastical jurisdiction expressly submitted to their cognizance. And the King's Bench only proceeded upon the issue joined in a *sci. fa.* to repeal letters patent, when it was sent to them from the Petty Bag in chancery. 1 *Mo.* 29, *Latch* 3, 4 *Inst.* 80. Although it must be acknowledged, the contrary seems to be implied in favour of the original jurisdiction of that Court, in 6 *Mo.* 229, and 4 *Inst.* 72. But however this may be, all the authorities upon the subject disprove the position that the Court of equity can proceed to the repeal of public grants; and should it be admitted that the *sci. fa.* for that purpose, may be made returnable in the first instance before the Court of King's Bench, yet it is to be doubted whether the Chancellor must not render the judgment himself, upon the proceedings returned in the Petty Bag, when ripe for judgment. 4 *Inst.* 79, 80, 83, 294. Notwithstanding some contrary adjudications, and the opinion of Mr. Justice Blackstone in his 3 *Com.* 48; *Oro. Jac.* 12, 1 *Mo.* 29, *Latch* 3, and if, by the rules of law, he is to render the judgment on the law side of the chancery, then it will also follow that as there is no Court in this country vested with an authority similar to that of the Chancellor in the Petty Bag, there is none that can give the necessary judgment after the institution of the *sci. fa.* and trial upon it. If on the other hand, such judgment may be rendered in the Court of King's Bench, and consequently by the wording our acts of Assembly before cited, by the Superior Courts of this country, it will still remain true, that the Court of equity cannot interfere. And then a further enquiry will be, whether the Superior Court of law cannot as well receive evidence of the invalidity of the grant, upon a trial in ejectment, as upon the issue joined in a *sci. fa.* to repeal it; as to which the rule seems to be this, that when the grant has issued under such circumstances as renders it void, for fraud, misrepresentation, deception or the like, the party injured may either proceed to have it recalled and cancelled, (2 *Bl. Com.* 348, *Freeman* 172,) or he may pro-

Oct. 1794.  ceed to avoid the effects of the grant, by recovering the property or right invaded by it, notwithstanding the grant, by such action as suits his case. 3 Lev. 220, 3 Nels. Ab. 202, s. 14, 4 Bac. Ab. 416. The reason why they are sometimes and indeed frequently recalled and cancelled by *sci. fa.* as I apprehend, is, that they may not be set up to the prejudice of the injured party, after the evidence to prove the circumstances that would invalidate them hath been lost. But in point of law, they are equally invalid and void when granted by mistake and upon deception, either in matter of fact or of law, as in case of false suggestion, misrepresentation or misrecital of former grants, of the interest of the grantor and the like, before as they are after the judgment of cancellation is pronounced. 3 Term Rep. 242, 2 Bl. Com. 348. And these circumstances of invalidity may be shewn before that repeal, in every possible action suiting the case of the party aggrieved, in which the point of invalidity can be brought before the Court; as in assize of nuisance, *quod permittat*, information in the nature of intrusion, trespass, ejectment; for which I beg leave to cite 5 Rep. 94, 6 Rep. 56, 1 Rep. 52, 10 Rep. 67, b. and particularly 2 Rep. 17. 33, 54, 10 Rep. 109, which are cases in ejectment, in which the invalidity of the King's grants were expressly decided; and prove beyond contradiction that the effects of an invalid grant may be avoided by proof of the circumstances that render them invalid upon the trial of the issue joined in that action. In the last of them it was decided that the grantee shall not be permitted to claim by any other title, than that expressed in the grant itself; and that if the King grants the manor of D, expressing in the patent that the said manor came to his hands by escheat, and in truth it did not come by escheat, the grant is void, because of the falsity of the suggestion, which shews him to have been deceived at the time. These cases are fully up to both points we wish to establish, namely, that the invalidity of the grant may be shewn in the ejectment, and also that a public officer granting land as the agent of the community, believing the title of the community to have come by one means, by means of confiscation for instance, when in truth it came by another, which if he had been apprized of, he would not and ought not to have executed the grant, does not thereby convey any property to the grantee; and we therefore hope, that the objection taken on the other side

will not prevail. One other argument hinted at in the course of the debate, and perhaps it fell from the Court, seems proper to be attended to—that the State having granted, if it were imposed upon in the grant, only has the right to institute process for its repeal. If we proceed by analogy to the *sci. fa.* in England, this is not so. The King in his own name, or any private person using his name, may institute this process to remove out of the way, a grant prejudicial to his interest. 4 *Bac. Ab.* 416, 5 *Bl. Com.* 261, 6 *Mo. Rep.* 229. So that altho' the State may never think proper to proceed in this case, yet *Sears* may institute the *sci. fa.* if it will lie in our Courts, and by the same reason may take advantage of the invalidity obliquely in this trial without any *sci. fa.* Oct 1794.

Per curiam, Judge ASHE and Judge WILLIAMS—We have often decided, and we are now of opinion, that the State having granted vacant lands, the first patentee will be entitled to hold them, notwithstanding any attendant circumstances that render it voidable, until it be actually avoided in the Court of equity; and that it cannot be avoided by any parol evidence given to a jury on a trial in ejectment, but the jury may find a special verdict if they please, subject as to this point to the opinion of the Court.—But the jury did not agree, and one of them was withdrawn.

Afterwards, at a subsequent term, the Court holding the same doctrine, there was a verdict and judgment for the Defendant.

NOTE.—Vide *Reynolds v. Flinn*, & the references in the note *ante* 106.

HALIFAX, OCTOBER TERM, 1794.

Wilson Carter v. John Branch.

A declaration in ejectment served on a tenant in possession, cannot be amended, so as to comprise more lands than those already described.—The Defendant in an ejectment will not be allowed to defend only as to so much as the Plaintiff can prove him in possession of.

Ejectment. The Plaintiff by his attorney, moved to amend the declaration, so as to comprehend more lands than were described in the declaration served on the tenant in possession. The tenant in possession moved at the same time, to be admitted to defend only as to so much of the premises as the Plaintiff could prove him to be in possession of, alledging that the locality of a line

Oct. 1794. was the matter of controversy; which if it ran where he, the Defendant, contended it did, he was not in possession of any part of the premises; if where the Plaintiff contended, he was then in possession of a small part only: but if he entered into the common rule generally, that would be claiming upon the record the whole lands described in the declaration, to any part of which he had no claim: and if he entered himself Defendant for such of the premises as lay between the line claimed by the Plaintiff, and that which he contended to be the true line, this would be an admission that the lands so defended for, were a part of those described in the declaration, which he by no means meant to admit.—Against the Plaintiff's motion, the Counsel for the Defendant argued, that no original process could be amended, there being nothing to amend by; and that a declaration in ejectment had always been considered as an original process, and therefore not amendable; and he cited 2 *Str.* 121. *Carth.* 178. 2 *Barnes* 13, 17, 154. *Carth.* 401. 5 *Mo.* 332, and though a case had occurred, where the Court had permitted the time laid in the demise to be extended, as reported in 4 *Burr.* 2448, 2449, yet that was matter of form only, and allowed to avoid the total bar of the Plaintiff's title by the statute of fine and non claim, which would have attached upon it had the amendment not been made, and the Plaintiff non-suited and put to commence a new action—but no case had ever happened, where an amendment in the description of the thing demanded, had ever been allowed in a declaration in ejectment, but the same had been expressly denied in the case of *Thompson v. Leach*, cited in 5 *Mo.* 334.

Judge MACAY—The amendment moved for cannot be allowed, for that would be to make a new declaration.

The other motion was then urged by the Counsel for the Defendant, and Judge MACAY asked if there were any precedent, to justify an admission to defend in that manner, when the Counsel for the Defendant cited the case stated in *Bull.* 97. and 2 *Bac. Ab.* 162. *Barn. Supp.* 24, 25. 2 *Barn.* 148. Where in case of several tenants, the rule may be drawn generally, that I. H. who claims title to the premises in question in his possession, shall be admitted Defendant for such messuages; and then Plaintiff must prove what lands are in his possession—or specially, that I. H. who claims title to such lands, expressing them particularly, should be admitted Defen-

dant, and then the Plaintiff need not make such proof. Oct. 1794.
 And he insisted, that in the present case, there was as much reason for admitting the Defendant in the manner first stated, as in the case where there are several tenants, since the tenant in the present case, could not defend otherwise, without making an admission of the fact he principally intended to controvert.

Judge MACAY—There is no precedent for such a motion as this, and therefore I cannot consent to it. The Defendant must enter his defence as he thinks proper; but I think the proposal made by the Plaintiff's Counsel a fair one, and fit to be acceded to, namely, that when the lands shall be run out by the surveyor, if the survey should include the lands claimed by the Defendant, that then he shall be at liberty to enter himself Defendant for as much of the lands claimed by him as should be included in the survey, particularizing them—and I would recommend the adoption of it. (137)

This appeared to the Defendant's Counsel, to be still an admission that these lands were a part of the premises described in the Plaintiff's declaration, as he must still enter himself Defendant for a part of the said premises in the declaration mentioned, *to wit*, that part to be so described—whereas his objection was not that the lands described in the declaration were not the Plaintiff's, for he admitted them to be so, but that the boundaries in the declaration did not comprise the lands which the Defendant claimed.—But the opinion of the Court being against him, he was obliged to accept of the proposal recommended to him.

NOTE.—As to the amendment vide *Troxler v. Gibson*, *post* 465—But see note to *Cowper v. Edwards*, *ante* 19, and *Adams* on ejectment 205.—Upon the other points see *Adams* on ejectment 234, 235.

Brickell v. Bass.

The neglect of bringing up an appeal under the act of 1777, *Rev. ch.* 115, *s.* 77, in proper time, is not relievable by *certiorari*, although occasioned by the neglect of the Clerk; and the appellee may move for the affirmance of the judgment with double costs, either at the first or any other term, after the appeal.

This was an appeal in an ejectment cause from the County Court of Nash. The jury below had found for the Defendant—and the appeal was returnable to this Court in October term, 1793. It was not then transmitted to the Clerk of this Court, but in April, 1794. The

Oct. 1794 Counsel for the Defendant having a copy of the record in his hand, moved to have it entered of record in this Court, and the judgment affirmed with double costs, agreeably to the act of 1777, *ch. 2, sec. 84*. The Counsel for the Plaintiff then moved for time to procure an affidavit for removing the cause by *certiorari*, alledging the neglect of the Clerk of the County Court, who had been applied to in time and failed to give a transcript of the record: and now at this term, the motion for affirming the judgment was renewed and the affidavit for the *certiorari* produced. It stated that this cause was tried in May, 1798; and that in August, 1798, *Brickell's* attorney had declined practice in that Court; but had applied by *Mr. Hall*, the attorney left to finish his business, to the Clerk for a transcript of the record, to be brought up and lodged with the Clerk of this Court. *Mr. Hall* intending, could he have procured it, to have brought it up himself—but was informed by the Clerk, that he had not then time to make it out, but that he would hand it in time to the office of the Superior Court Clerk. Upon this affidavit the Plaintiff's Counsel contended, that the act of Assembly only contemplated the affirmance of judgment and double costs, in cases where the appellant craved the appeal for the purpose of gaining time, and delaying the other party; but many cases had occurred, where the appellant having been hindered by accident, or the default of the Clerk, from bringing up his appeal in time, had been helped by *certiorari*; and that he understood the rule in such cases to be this, where it was not owing to the default or neglect of the appellant, but to some other cause not under his controul, that the appeal was not brought up in time, he should be relieved by *certiorari*; for it frequently happens that the appellant has good cause for his appeal, and may intend to prosecute it, but owing to the default of the Clerk of the County Court, or to some other cause not imputable to the appellant, he may be prevented from having it removed in time; and then surely it would be great injustice, and not within the true meaning of the act, that the judgment appealed from should be affirmed.

Judge MACAY—The act is express, that unless the transcript be filed with the Clerk of the Superior Court fifteen days before the commencement of the term, the judgment shall be affirmed with double costs; and I cannot narrow down the operation of the act, by guessing

at what was the probable meaning of the Legislature. If Oct. 1794. the Clerk has done amiss, he is liable to pay a fine to the party grieved, and to answer him in damages; as also to be prosecuted for a misdemeanor in office; and that must be the remedy which the Plaintiff must pursue; of course the judgment must be affirmed with double cost, and the motion for the *certiorari* overruled. The Counsel for the Plaintiff then begged leave to make some other observations, which had escaped him whilst up before, and said he would submit whether it was not now too late to move for an affirmance of the judgment—the appeal was returnable to October term, 1793, and the first day of that term was the day in Court given to both parties; in like manner as if a writ or any other process had been returnable to that term, that would have been the day given to both parties to appear; if in such case, the Plaintiff had not caused the writ or other process to be returned, and the Defendant should not be called upon, and the cause continued in Court to another day given to the parties, it would be clearly a discontinuance of that cause, and a dismissal of the Defendant from all further attendance on it. So here, the appellant and appellee being both to appear in October term, 1793, the appellee to answer to the appeal if brought up, or to move for affirmance of judgment if not brought up, and the time having passed without any thing done, or any motion made on either side, or any further day given, they were after the expiration of that term both out of Court, and could not be again brought in but by some new process; otherwise this inconvenience would result, that ten years afterwards the appellee might come into Court, and move for the affirmance of the judgment, and double costs, when perhaps in the mean time, the appellant might have satisfied the appellee, or obtained his release or other discharge from the demand or cause of action, and he would have no opportunity to shew this against the motion for the affirmance of the judgment. If the appellee may move for the affirmance at the second term, he may move by the same reason at the fourth or fortieth term after—he may wait until the evidence of the release or discharge be destroyed, or till the appellant has moved away to another State or country, and then subject his bail here, or such property perhaps as was bound by the judgment in the County Court, though in the hands of a *bona fide* purchaser.

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Oct. 1794. Judge MACAY—It might have been proper perhaps, in forming the first decisions upon this clause of the act, for the Courts to have held it necessary to move for the affirmance of judgment at the first term of the Superior Court after the appeal prayed; but the uniform practice hath been to move for the affirmance at any term after; and cited some adjudications in this circuit at Newbern to that effect; and therefore notwithstanding this latter objection, he ordered the judgment to be affirmed with double costs, and it was affirmed accordingly.

NOTE.—As to what circumstances will be deemed sufficient to entitle a party to a *certiorari* see *Chambers v. Smith*, post 366, *Robertson v. Stowe*, post 402, *McMillan v. Smith & Walker*, 2 Car. Law Rep. 77, *Dyer v. Rich*, 2 Car. Law Rep. 610, *Steele v. Harris*, *ibid.* 636, *Hood v. Orr*, N. C. Term Rep. 151, *Davis v. Marshall & Russell*, 2 Hawks, 59, *Mera v. Seales & McCain*, *ibid.* 364. The propriety of the other part of the decision was denied by HAYWOOD Judge, in an anonymous case, post 171.

Hamilton v. Mary Williams.

MACAY Judge inclined to think that the hand-writing of a subscribing witness, who had voluntarily become interested in the bond could not be proved. *Sed adjournatur.*

(140) Debt upon bond, and *non est factum* pleaded. The attesting witness was one *Cordall Norfleet*, and there was an indorsement on the bond, transferring it and its contents to him. The bond itself bore date prior to the time when bonds were first rendered negotiable in this State. It was argued for the Plaintiff, and insisted upon, that the hand-writing of *Norfleet*, the attesting witness, might be proven; and this was compared to the case in *Stra.* 34, where the subscribing witness having become the administrator, his hand-writing was admitted to be proven. It was also compared to the cases where the witness becomes blind, or is convicted of perjury or forgery, or is made a legatee, or becomes heir. And the evidence in the present case offered by the Plaintiff was admitted, Judge MACAY being on the bench, and a verdict obtained: whereupon, Gen. *Davie* moved that the verdict might be set aside, the evidence upon which it was grounded, being improper; and he argued that in the case of the executor, administrator or legatee, the law gave them that character, or placed them in that situation, which disabled them to give testimony; at least they did not acquire such characters or offices by their own independent voluntary act, and in such cases there was no room

for presuming any combination between the obligee and the witness: but these cases are not like the present, if the evidence admitted in this case should be allowable, a wide door would be opened for fraud, and it would immediately be put in practice—the forger of a bond would have nothing else to do, but to endorse to the subscribing witness, and that witness to sue and effect the recovery upon proof of his own hand-writing. Should it be a case of usury or of gaming existing in the knowledge of the witness only, as frequently happens, an indorsement like the present, and the admission of such testimony, would effectually exclude the truth of the transaction, and make the bond valid, though in reality it was void by the rules of law. Should this decision be established as law, it will immediately become the common practice to assign all such bonds to the witness, for the purpose of procuring a false validity to them. This case, therefore, is not to be assimilated to the cases cited—in those no mischief results from the admission of proof of the witness's hand-writing. It is not to be presumed that the witness will undergo a conviction of forgery or perjury, or that a testator, intestate or ancestor, will procure the person that is to be his executor, administrator or heir, to witness a forged instrument, or one invalid in other respects, to the end that after the death of himself, a recovery may be effected by proof of their hand writing. There are but few men have attained to such a degree of baseness, as to contrive frauds to be executed after their deaths; the uncertainty itself of the time of death, which is generally viewed as at a distance, is a sufficient guard against any such attempt—but in this case, and in all cases like it, the mischief of such evidence is greatly to be apprehended.

Judge MACAY seemed to be of this opinion, and he ordered the judgment to be stayed until this question could be argued before more Judges; and it was adjourned. (141)

NOTE.—Vide acc. *Hall v. Bynum*, 2 Hay. 328, *Johnson v. Knight*, 2 Mur. 237, *S. C.* 1 Car. Law Rep. 93. *Hall v. Bynum* was a case in which the subscribing witness had endorsed to the Plaintiff the bond which had been assigned to him; and in such a case, if the subscribing witness had endorsed without recourse to him and was also released by his endorsee, the Plaintiff, he would be a competent witness. *Billingsby v. Knight*, *N. C. Term Rep.* 103.

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MORGAN, MARCH TERM, 1795.

State v. Greenwood.

After a verdict, in an indictment, it is too late to object that one of the jurors was not a freeholder in this State. If it appears upon another trial of the same cause, in which the perjury is assigned to have been committed, that the person convicted did not swear falsely in the first trial of the cause, a new trial will be granted him upon that ground.

He was indicted of perjury, and convicted; and his Counsel moved for a new trial, upon the ground that one of the jurors was not a freeholder in this State. The juror had been examined before he was sworn on the jury, whether he was a freeholder or not, and answered in the affirmative. The fact is, that he was a freeholder in South-Carolina, but not in this State. This appeared by the affidavit of the juror himself, now produced in support of the motion.

Judge MACAY—I think this is a case that deserves consideration. I have understood this objection has formerly prevailed in a civil case, at Hillsborough, in an ejectment cause in which General *Butler* was Defendant.

Judge HAYWOOD—I will give no judicial opinion, having preferred this indictment whilst Attorney-General. Were I to give one, I should not hesitate to decide against the objection—he might have taken his exception to the juror before he was sworn; that is the time the law appoints for him to take it; and in this, as in all other cases, when the objection is not made at the appointed time, and the parties proceed to other stages, which in point of order are posterior, they can never afterwards be allowed to recur to the advantage they have passed; as if a Defendant pleads in disability of the Plaintiff, he admits the jurisdiction of the Court; if he pleads to the Court, he admits the ability of the Plaintiff; if he pleads to the writ, he admits the form of the Court to be good; if he pleads in bar, he waives all pleas in abatement; if he is to plead to a *sci. fa.* he cannot defend himself by any matter of defence he might have used in the first action. So it is with respect to challenges—if the party will not take his challenge before he is sworn, he can never afterwards challenge for a cause existing before he was sworn. Vide *Trials per pais*, 142, 145. 3 Burr. 1858. Were a Defendant allowed to take his challenge to the jurors after the trial, he never would do it before, but would always rather depend upon moving it to the

Court after trial—for if he should be acquitted, he would say nothing about the disqualification of the juror; and if convicted, he could avoid judgment by offering his objection. This in fact would be placing him in a situation totally exempt from danger and from punishment, so long as he could get a juror sworn against whom he could offer any legal objection, and would give him the additional advantage of several chances for his acquittal. There is a case in *Leach*, which comes nearly enough to the present to shew the principle I have spoken of. There the officer that returned the jury, was the prosecutor of the indictment, and consequently the whole array was liable to be quashed had the Defendant made the objection at the proper time—he however put himself upon his trial without taking the exception, and was convicted; he then offered to take the exception, but the Court held it then too late to take it, and overruled the exception. The cause was adjourned for further consideration. See 5 *Bac. Ab.* 245, 7 *Mo.* 54, *Holt* 235. Mar, 1795.
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NOTE.—This motion came on at a subsequent term, before Judge ASHE and Judge MACAY, and they disallowed the exception, but delayed giving judgment for another cause; and at September term, 1796, the cause being tried, in which the perjury was alledged to have been committed, before Judge WILLIAMS and Judge HAYWOOD, and they being of opinion, from the oaths of several witnesses, sworn on that trial, concurring in the same fact that *Greenwood* had formerly sworn to in the trial of the same cause in the County Court, that probably it was not falsely sworn by him; they thought this might be a proper cause for a new trial, and granted a new trial accordingly on that ground.

NOTE.—The objection with respect to the juror, would have been a good one if taken at the proper time. *Sheepshanks & Co. v. Jones*, 2 *Hawks*, 211. But after the verdict it is too late. *State v. McEntire*, 2 *Car. Law Rep.* 287, *State v. Ward*, 2 *Hawks*, 443.

Mehaffy v. Spears,

In this case, the jury could not agree upon the evidence, and a juror was withdrawn: But it seemed to be agreed by all the bar, and Judge MACAY, that if the jury had found for the Defendant on his plea of "tender and refusal at the day and place," where he was bound by a sealed writing to deliver a certain parcel of cattle, that the Plaintiff would have been forever barred of any recovery on the covenant.

This was an action of covenant upon a sealed writing, for the delivery of a certain number of cattle, of a certain description, on a day stipulated and stated in the agreement. The Defendant pleaded a tender and refusal at the day and place, and upon this the Plaintiff joined

Mar. 1795. issue. And now on the trial it appeared in evidence, that the Defendant on the day and at the place appointed, tendered a greater number of cattle than the writing demanded—some of them answering the description, others not; so that the chief matter of dispute upon the evidence was, whether there were as many cattle of the description as the contract required. It appeared further upon the evidence, that after the tender made, and refusal to accept the cattle on the part of the Plaintiff, the Defendant killed part of the cattle, and sold others. The jury could not agree, and a juror was withdrawn.

(148) NOTE.—Notwithstanding the circumstance of the Defendant having killed part of the cattle, and disposed of others of them, it seemed to be agreed by the attorneys on both sides, and indeed to be admitted by all the bar, and by Judge M^{ch}x, that if this issue should be found against the Plaintiff, he would thereby be utterly barred of his recovery upon the covenant. This seems to be amongst the *apices stricti juris* that are not very conformable to the common ideas of justice.— Shall the Defendant be allowed to retain the value received for the cattle, by killing and disposing of them, and be discharged at the same time, by his tender, from a debt of the same value due to the Plaintiff? Shall he be discharged of his debt when it is apparent the refusal on the part of the Plaintiff, has not been attended with any loss to himself? The opinion that holds the affirmative of this proposition, seems to be founded on a passage in *Co. Lit.* 207. “If a man be bound in two hundred quarters of wheat for delivery of one hundred, if the obligor tender at the day one hundred, he shall not plead *uncore prist*, because albeit it be parcel of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them.” This passage is founded on the report of *Peyton’s* case, 9 *Rep.* 79, where this was not the point in question, but mentioned *arguendo* only—and only says, “If the obligor in such case tender at the day, and the other refuse, he shall plead it, without saying he is yet ready, because the corn is become *perituum*, and it is a charge to the obligor to keep it.” The author of 5 *Bac. Ab.* speaking of such a tender, says, “But if the thing tendered be so heavy that it cannot be well carried, it is not necessary to plead a tender of this with a *proferet in curiam*.” He cites *Bro.* and 2 *Roll’s Ab.* 524. May not a mistake have arisen from the equivocal use of term *uncore prist*? When the debt or duty is discharged by a tender (as it is in some cases where it depends solely on a condition performable by tender, and is not a debt or duty precedent and independent of the condition) the party in pleading shall not be bound to say *uncore prist*; and may it not have been inferred from hence, that whenever he is not bound to plead *uncore prist*, the debt or duty is discharged? Yet perhaps this is not a necessary consequence; it is possible the not being bound to plead *uncore prist*, may be for another reason in some cases, namely, where it would be chargeable to the party to keep the goods tendered, or to hire a warehouse to preserve them, or to buy provender for the cattle; which, and the like reasons, may be justly sufficient to exempt the party from the necessity of pleading *uncore prist*, and yet be no sufficient cause to discharge him from the debt or duty entirely. Indeed, in such cases, justice seems to require that he should not be compelled to keep the expensive article always by him, so as to be

able at all times to plead always ready; as in the case of money, which Mar. 1795.
 may be kept without any expence, though not without some disadvantage and risk. These suggestions aim only at the exciting an enquiry into a position, which under the circumstances of the case at Morganton appears hardly compatible with justice.

NOTE.—On the same page of *Co. Litt.* to which *Haywood* refers in his note to this case, is to be found this passage: “If an obligation of an hundred pound be made with a condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuseth the same, yet in action of debt upon the obligation, if the Defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, and tender the same in Court. But if the Plaintiff will not there receive it, but take issue upon the tender, and the same be found against him, he hath lost the money forever.” This passage is contrasted with that referred to in the Reporter’s note, and the reason assigned for the difference is, that although the 100 quarters of wheat is parcel of the condition, yet as they are *bona peritura*, the obligor shall not be bound to keep them and plead *uncore prist*. The money is not so liable to perish, and is no charge to the obligor to keep; therefore the debt or duty shall not be extinguished, unless the Plaintiff denies the fact of tender, and goes to issue upon it; in which, if it be found against him, he shall lose his money forever. Here the difference and the reasons for it, are plainly observable; that in the case of the perishable goods, the obligee risks the entire loss of them by *refusal at the time of tender*; but in the case of money, he does not forfeit his right to it, until, after suit brought and tender pleaded with an *uncore prist*, he refuses to take the money, but joins issue upon the fact of the tender. It seems according to later authorities, that the Plaintiff would not lose his debt, as the plea of tender is in bar of damages only, and the debt or money due is always brought into Court. 1 *Saund.* 33, note 2. But it might be difficult to find an authority which recognizes a right to perishable goods after tender and refusal; and an attentive consideration of the case might not discover much injustice in it. It may be very difficult to obtain, in the first instance, specific articles of the kind and description mentioned in the obligation; and after the Defendant has been at the trouble and expence of procuring such, and making a tender of them in discharge of his obligation, if they are refused, no course can be pointed out to place him in the same situation as if they had been received. Those articles which he has already procured may perish, and it may be impossible for him to obtain others; and to say that he should pay the value, would be subjecting him to a different liability from that which he contracted for, without any default on his part. The merely discharging him from damages could not there, as in the case of money, answer the substantial justice of his case. *Idco quere.*

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SALISBURY, MARCH TERM, 1795.

Houser v. Reynolds.

(144) Ejectment. The Plaintiff and Defendant both claimed under one *Wright*, who while an infant, had conveyed to *Houser*; and after full age, to *Reynolds*; but after coming of age, and before he conveyed to *Reynolds*, he said to *Houser*, "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land;" and upon the authority of some cases cited by Mr. *Whyte*, from *Bac. Ab. Verb.* Infant, where such or the like words, had been held to be a confirmation of the deed, Judge MACAY directed the jury to find for the Plaintiff; and they did so. There were many other points made by the Counsel in the argument of this case, but the whole cause seemed at length to turn upon this only, and therefore the others are omitted.

ANONYMOUS.

Under the act of 1762, *Rev. c. 69, s. 20*, which directs the bonds taken on binding out orphans, to be made with the Chairman of the Court and his successors, the bond is good although the successor be not named; and a suit may be sustained in the name of the successor. After the plea of conditions performed, no advantage can be taken of any inconsistency in the indentures of apprenticeship, as where, in a part of the instrument, the name of the apprentice is put for that of the Chairman. A verdict finding, among other things, an issue not submitted to the jury is void as to such finding.

This was an action of covenant in the name of the Chairman or presiding Justice of the County Court, against the Defendant, to whom the real Plaintiff had been bound as an orphan child; and he declared upon the indentures, taken under the act of 1762, c. 5, s. 20, and stated as a breach, that the Defendant had not taught him the trade he agreed to teach him, that he had not taught him to read and write, &c. The Defendant pleaded, that he had performed his covenants, &c. Upon the trial, the Plaintiff's Counsel produced the indentures, and read them to the jury; whereby it appeared that the covenants were introduced in the former part of the instrument, as between the Chairman of the Court, but not with his successors, of the one part, and the Defendant of the other; and in a subsequent part, the name of the apprentice was put for the name of the Chairman, which rendered the whole writing insensible.

It was objected on the part of the Defendant, that this bond is not made pursuant to 1762, c. 5, s. 20, which directs it to be with the Chairman and his successors, and therefore it was not such a writing as could be prosecuted in the name of the successors of the presiding Justice named in the indentures; and that this action being in the name of the successor, the present Chairman, could not be supported; and moreover, that the covenants being insensible, by the mistake in the subsequent part of it, was therefore wholly vitiated, and that no action whatever could be supported on it. It begins as a covenant intended to be made with the presiding Justice, and then recites an agreement with the apprentice. These objections were reserved for further consideration after the verdict should be taken, which was agreed to be made subject to the opinion of the Court upon them; accordingly the jury gave a verdict, that the covenants were not performed, and assessed damages; and afterwards on a subsequent day in this same term, the objections were argued, and the Court gave their opinion.

Per curiam—The first objection here is, that the covenants are not made with the successors of the presiding Justice as well as with himself, and for that reason it is argued the successor cannot maintain this action as he might have done had these words been inserted.—The second is, that the covenant produced is insensible, through the mistake of inscribing the name of the apprentice in the subsequent part of the indenture, instead of the name of the presiding Justice, as it should have been. As to the first, though it be the general rule, that a personal chattel cannot go in succession to a sole corporation, yet it was the clear intent of this act, that indentures of apprenticeship should be sued in the name of the presiding Justice and his successors; and if an action cannot be maintained in the name of the successor, when the presiding Justice is dead, as in the present case, it will be difficult to say in whose name it shall be brought so as to answer the purposes of Justice. It might be objected with propriety, that the executors of the former presiding Justice could not maintain it because they are not named any more than the successors, and at the making of the covenant there was no intention in the contracting parties that an action ever should be maintained by executors. The law itself not intending the action to be brought by executors, hath not declared them trus-

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Mar. 1795. fees for the apprentice; and should they be allowed to maintain the suit and effect a recovery, they would also be entitled to receive the money, and the Court could not say they are only trustees. In all cases at law, the person who maintains the suit is entitled to the benefit of it, unless in those special cases where he is by statute declared to be a trustee and a nominal Plaintiff only—suppose in the present case, the executors may be considered in the light of trustees, they may then assign a breach of covenant as having not been performed; but how can they aver it to be *ad damnum ipsorum*, who in truth have sustained no damages, as not being the legal father or guardian of the rights of the apprentice? If neither the executors nor yet the successor can maintain this suit, much less can the apprentice himself maintain it, for the covenant is not made with him, nor can be by law; and should the objection prevail against the right of the successor, the covenant would be wholly invalid, and the injured apprentice left without remedy. It would be improper therefore for the Court, to give a ready ear to this objection. The indentures are either made under the authority of the act 1762, or they are void, for if not made under that act, then what power had the presiding Justice to make any covenant relative to the orphan, or to bind him at all? Or how can the Defendant justify his taking the orphan at all into his service? It will be improper to pronounce the covenant to be void, for that will defeat the plain intent of the parties and the ends of justice; and the Court will support it if possible. It is a rule, that whatsoever is sufficiently implied, need not be expressed; and the act hath directed the covenant to be with the presiding Justice and his successors, principally with a view of pointing out the party who was to bring the action, in case of a breach of the covenant, and the death of the presiding Justice. Had the word successors been omitted in the act, doubts might have arisen for want of an express declaration respecting the proper person to bring suit after the death of the presiding Justice; which doubt is prevented by the addition of the words successors in the act. It here has only the effect of pointing out decisively the person that is to sue upon such an event; but yet the covenant without the words successors, has precisely the same legal properties and consequences attached to it as it would have with it; for whenever the maker of a personal contract, acts as an

agent for the benefit of others, by appointment of law, Mar. 1795. in an official character and in the name of his office, which is to be perpetually continued, such contract belongs to him only in his public character; and whenever he becomes divested of that, will belong to the same character though sustained by another individual. It is true there are some cases in the books, where the law will not allow of the succession of a personal chattel at all; as anciently in the case of Abbots, Bishops, and others from policy and mistrust of these characters, lest under the pretence of advancing the interests of religion, they might draw from the people more wealth than was consistent either with the circumstances of individuals, or that moderate degree of power and influence flowing from wealth, in which it was prudent to keep the ecclesiastics & other sole corporations: but in almost every case, where the official character is conferred with a view to its being exercised for the benefit of others, a personal chattel, or the right to sue upon a personal contract, devolves to the successor upon the death or removal of the former officer. Thus in England, the King by operation of law, has a public capacity and perpetual existence, and may contract in that character for the benefit of the public; and in case of the death of the individual who sustains the office, the personal chattels and rights to personal things which he had in that character, shall go to his successor. *Wood's Inst.* 113. 21. *Co. Litt.* 90, a. 11 *Rep.* 92. and in his case, the word successors is implied, though not expressed in the contract; as in the instance of a recognizance taken in Court, the cognizor only acknowledges himself indebted to the King, not saying and his successors; yet the successor is entitled to sue for the money due upon it. The law will not permit the executors of the predecessor to recover it, persons in whom the public hath placed no confidence, & are not of public appointment. Here the omission of the word successors does not render the transaction void. Upon the death of the officer, his successors are comprehended in the name of his office. In the case of the president of a college, where a statute directs a suit for the breach of the statute, to be brought by the president for the time being, if the president sue and recover, the successor and not the executor, shall sue out the *sci. fa.* for the character or office of president still continues. *Cro. Jac.* 159. 4 *Bac Ab.* 411. Here the

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MAY. 1795. statute said nothing of successors, but they were implied in the name of the office. If an orphan bond be made to the chamberlain of London in the name of his office, and he died, his successors not the executor shall institute the suit for the benefit of the orphan. 4 *Rep.* 65. 4 *Inst.* 249. So in the present case, the Chairman or presiding Justice acted only in his official character for the benefit of another, the orphan; and though the individual who sustained that office be dead, yet the office itself still has a legal existence, and capacity to be exercised by another. It is the same office now as it was then, and confers upon the individual who exercises it all the same powers his predecessor had, and that of commencing this suit amongst others; and the very name of the office implies all the successors that ever shall be to it—like the case of church wardens, who are instituted by law for the benefit of parishioners, to transact various kinds of business for them, and so far as regards that, to have a corporate capacity of commencing suits. If they sue whilst church wardens, and their year expires before the determination of the suit, it shall be continued by their successors, and will not abate; which proves that it is the name of the office, and not the adjunct name of the individual, that the law regards. *Stra.* 852. *Cro. El.* 145, 179. 1 *Lev.* 177. Great indeed would be the evil if the law were not so, and the name of the individual and not that of the office, were to be principally attended to—the officer is continually changing by death, resignation, removal and other occurrences—some offices are but of annual duration, and the officer must necessarily be removed before a suit could be carried through all its different stages—were his going out of office to operate an abatement of the suit instituted for the sole benefit of another, justice might be greatly hindered, and in some instances be rendered wholly impossible to be obtained. The Governor of this State is an instance—almost all bonds for money due, or to become due to the public, are taken in his name as Governor—there can be no doubt, that either he or his successors must bring the suit; the law will not trust his executors. Were suits instituted by him to be abated by his going out of office, how many of the public demands would be lost? His election is annual as to him, his office is but of a year's duration, and it generally takes up a longer time than that, at least in many in-

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stances, before a suit can be determined. It would be monstrous to say, that suits should abate in such cases —yet if his successor is not implied and included in the name of the office the suit must abate, there being no real Plaintiff to support it. It is therefore a position subject to no doubt, that when a Governor, presiding Justice, or other officer entrusted by law to take bonds for the benefit of others, does take them accordingly, though without making them payable to his successors, that the successor may, notwithstanding, commence actions upon them, and in case of his death after the institution of an action, and before its determination, that that action may be continued by his successor without any abatement. — (In England however, the name prefixed to the office in the King's case, is so far regarded, that the death of the individual abates the writ. 7 Rep. 31, a.) And this right of the successor to sue, though not named, holds in all cases except where the law directs otherwise; as in the case of guardian bonds, which by the 7th sec. of 1762, are to be sued by the executors; and other cases where the law directs an assignment to the party grieved. In some of which perhaps, a suit may be maintained in the name of the assignee. *N. Car. La.* 29, sec. 5. but such bonds are not suable by executors generally; for then they might receive the monies of others, without security given to pay them into the proper hands; they might also upon improper motives, either refuse to sue, or dismiss the suits when brought; or give releases or enter retraxits, at their pleasure; and the utmost confusion, uncertainty and fraud be introduced—for if executors should once be acknowledged to be the proper persons to sue, they must be also allowed to be the proper persons to do all these acts. And there is no foundation in reason to say, that the omission of the word successor, shall defeat the instrument entirely. The objection therefore founded upon that omission is not valid.

As to the other objection, that the name of the apprentice is put in a subsequent part of the instrument, instead of that of the Chairman; if upon the profert thereof made in the Plaintiff's declaration, the Defendant had craved *oyer*, and demurred for the variance between the covenant set forth and that which appeared to be in the indentures, the objection might then have been fatal; but where the covenant stated in the declaration, is once admitted to be as there stated, by a plea of

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covenants performed, he cannot afterwards be permitted to say there is no such covenant; and the production of the warrant afterwards upon the trial by the Plaintiff is irregular, although it is often done when a declaration is mislaid, or not readily to be come at, it being presumable that the declaration has been drawn in conformity to it; and the court ought to take no notice of an inconsistency in the writing itself, discovered upon such an irregular reading—they cannot do it without a departure from the record and the issue submitted to the jury, which is, whether the Defendant has performed that covenant that is set forth in the declaration.— 3 Term 302, 303. *Doug.* 302. *H. Black. Rep.* 91. 1 *Stra.* 298. 2 *Stra.* 1149. *Kidd on bills*, 154, 155. 6 *Rep.* 45. 2 *L. Ray.* 852. And although the jury have found the covenant to be in the words of the indenture produced on the trial, which is variant from that stated in the declaration, it is not to be regarded; for they cannot give a verdict upon any point, except that contained in the issue with which they are charged; and then the finding by them what the covenant really was, as well as that the covenants were not performed, is void as to that part of the verdict stating the covenant, and not to be proceeded upon or attended to as a part of the verdict at all. 2 *Roll's Ab.* 691. 2 *Mo.* 5. *L. Ray.* 390, 864, 1521. 2 *Rep.* 4. 2 *Stra.* 873. 5 *Ba. Ab.* 310. The court must proceed upon the legal parts of the verdict only, that is to say, that the covenant stated in the declaration has not been performed, and the assessment of damages for the non-performance—of course the second objection must also be overruled, and the Plaintiff must have judgment.—And he had judgment accordingly.

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Lewis v. Williams.

Detinue. For two resolutions of the General Assembly directing certain sums to be paid to *Lewis and Crafton*, for services performed as officers in the State legion—that which belonged to *Crafton*, had been sold by him to *Lewis* and delivered to him—they came afterwards into the hands of *Lanier*, who died possessed of them, leaving the Defendant one of his executors, who by that means also came into possession. *Non detinet* was pleaded, and a verdict found for the Plaintiff, and an entire value and damages assessed. The Defendant

moved an arrest of judgment, assigning various reasons, Mar. 1795.
 and these amongst others, *to-wit*. That in the writ the
 resolutions are described in part by the day of their date,
 and in the declaration also; but the day stated in the
 declaration, was not the same as that stated in the writ;
 and so there is a variance between the writ and decla-
 ration in a material part. Also the jury have assessed
 an entire value and damages for both resolutions, where-
 as they should have assessed a value and damages for
 each separately, or at least a value for each separately.

One of the Judges, now on the bench, having instituted
 the action whilst at the bar, and declining to give any
 opinion, the cause for that reason was adjourned.

The parties afterwards compromised the dispute, and
 the reasons were not argued.

NOTE.—As to the first of these objections, it seems to stand but
 upon slender foundations. The Defendant should have craved *oyer*
 of the writ, and by his plea in abatement have pointed out the vari-
 ance, and prayed that the writ should be quashed; but he comes too
 late to take advantage of this circumstance, after failing to take it at
 the proper time, and especially when he comes after verdict. *Latch*
173. 5 Geo. I. ch. 13. But with respect to the latter objection, that
 probably is possessed of some solidity; and as the action of detinue
 is of very general use in this country, it is to be lamented that this, as
 well as several other controverted points, were not settled by judi-
 cial decisions—for there is hardly any evil in the law department
 more mischievous, than uncertainty in the manner of proceeding in
 courts in actions that are in general and frequent use. The old books
 themselves, that treat of this action when it was in use in England,
 leave many points very necessary to be reduced to certainty, in much
 perplexity; some of them say that the writ may be general, demand-
 ing *bona et catalla*, and that the Plaintiff may count of three or more
 papers. *21 H. 6. 29.* Some say the writ need only name the num-
 ber of charters or writings, as that he render one charter or three
 charters, or one writing obligatory or testament, &c. &c. *F. N. B.*
138. but that the declaration must reduce all to certainty as to time,
 place and value. *1 Rd. 3, 20. a. 3 H. 6.* and accordingly it hath
 been the common practice, both in the English courts and our own,
 where there are several articles sued for, *diversi generis*, to name
 each article, and its value, in the declaration; or if many individuals
 of the same species are sued for, as a flock of sheep, sacks of corn,
 spoons, and the like, to specify the number and value. *New B. Ent.*
169. Lib. Int. 218. B. s. 4: 211. D. s. 2. And in actions for ne-
 groes, which are capable of a more exact description by name, each
 negro is named and his value. This certainty in the declaration
 however may be required, only for the purpose of enabling the De-
 fendant to plead in bar, should there be a recovery by the Plaintiff,
 or a verdict and judgment against him, either in all or in part—for in-
 stance if several things of the same species, capable of precise identi-
 fication, as several negroes of different names, should be sued for,
 and a verdict and judgment for the Plaintiff as to some of them, and a
 verdict against him as to the others; if the declaration mentioned
 them only as so many negroes, and the verdict should find for the

Mar 1795. Plaintiff as to part only, not identifying them, and against him as to the others, it would be impossible ever to know which of the negroes were recovered, and which not; and though the jury might assess a value and damages for them, and the Plaintiff by that means obtain the value; yet should he afterwards sue for part of the same negroes again, describing them by numbers only, it would be impossible for the Defendant by producing the former record, to shew that their value had already been recovered of him, or that the Plaintiff had been barred as to them; but it will not follow from hence, that the value of each must be assessed by the verdict, for if they are described with sufficient certainty in the declaration, and named with the same certainty in the verdict, that record will always be capable of repelling the claim of the Plaintiff, either as to the negroes recovered, or as to those for which a verdict was against him, although an entire value be assessed with respect to those recovered. The same may be said of bonds, or writings sufficiently described and identified, if it be necessary at all to assess a value for each article, it is because upon going out of the *distringas*, some of the articles may be delivered and the others not; and then the Sheriff would not be able to know how much money he ought to receive for these articles, the value of which were not assessed; but it is doubtful whether upon the *distringas*, the Sheriff can receive the value; for the object of the *distringas* is to enforce the delivery of the thing itself, the judgment being for that, if to be had in the first instance, and if not to be had, then for the value and damages; anciently for the thing and damages; and if not to be had, then all in damages. According to what is said in some books, the assessment of the value seems to be of little or no use; for although it be assessed, if the Sheriff return upon the *distringas*, that the thing recovered is not to be had, then the execution seems not to issue for the value already assessed but another jury is to be called in to assess damages *in toto*; upon which a common execution for money goes out to buy them. 3 Bl. Com 413. *Rast. Ent.* 215. 1 Roll. 737. *Jenk.* 288. pl. 23. 1 Sid. 246. If this be the practice in all circumstances, then the assessment of value in the first instance is not of absolute necessity; since it can have no effect, and of course an imperfect assessment, or one not made in the usual manner, cannot vitiate the other parts of the verdict, which are useful and substantially well founded. But if the assessment of damages after the return of the *distringas*, is only to be made where the judgment hath been given upon demurrer, or where the jury omit to find the value, as possibly may be the case, and indeed seems very deducible from *Plow.* 84 and 283. 1 *Keeble* 882. in the first of which it is decided, that the jury must find the value; in the last, that the omitting to find that value, may be supplied by writ of enquiry—and in the second there is a demurrer, the declaration being for several things of a different kind, upon which the judgment is, that the Plaintiff do recover the goods and chattels, &c. or their value, and a *distringas* issued to compel the delivery of them, and directing the Sheriff to enquire of the damages for the detention and costs: and in case of non-delivery of the goods and chattels, then to enquire how much they are worth, and the Sheriff returned one value for all, and damages for the detention and costs, and there was judgment accordingly. If this distinction be granted to be well drawn the result will be that the *distringas* upon verdict assessing the value, is in the disjunctive, to compel the Defendant to deliver the goods or the value of so much in lieu of them. *Morgan's Pleader* 328; but where the jury omit to find the value, and the judgment is rendered upon that finding or upon demurrer, that the *distringas* then is, for the delivery

of the goods or their value, without saying without what value; and Mar. 1795. in the latter case with a further direction to the Sheriff, that if goods are not delivered, that he enquire of the value damages for detention, costs, &c. and then if it appears upon the Sheriff's return, that the goods are not delivered, there issues a *sci. fa.* or *ca. sa.* or if in the former where the *distringas* issues without that clause, the same thing appears upon the Sheriff's return, then a jury in court is called upon, to supply the omission of the former jury, and to assess damages *in toto*. These distinctions will reconcile all the cases to be found in the books, and are therefore very probably the true ones, though it must be confessed in one instance perhaps, owing to a want of attention to these differences, contrary practice hath been adopted in our courts in the case of *Merritt v. Warmouth*. There the jury assessed a value considerably above the real value of the negro, but the Defendant before the action brought, had re-delivered the negro to *Waller*, who had hired the negro to him; and when the *distringas* went out, he could not deliver him to the Sheriff, and upon his return to this effect, and a complaint made that the assessment was too high; it was said by the counsel for the Plaintiff, and admitted by the court, that there must now be a new assessment of damages *in toto* before a *fi. fa.* or a *ca. sa.* could issue; and accordingly a jury were empaneled in court to assess the damages, and did assess them, and the execution for the money or damages was issued accordingly. *Halifax October, 1792.* If however the distinctions before mentioned are just, then it would seem to follow, that every article demanded, capable in its nature of a distinct sensible description, and not making a part of the whole thing demanded, as the sails of a ship or other appurtenance, should have a separate value affixed to it by the jury who tried the issue; to the end that should the Defendant be disposed to pay the value of some article which he cannot deliver, he might know what to pay, and the Sheriff what to receive for that article. Although the same precision may not be necessary when a jury are called to assess the value, after the return of a *distringas* issued in consequence of a judgment upon demurrer; for there, if some things are delivered and others not, it will appear upon the return what articles still remain undelivered; and as it also appears by the return, that the Defendant cannot or will not deliver any of those, there will no longer be the same reason for assessing a separate value upon each; and an entire assessment for the remaining articles will be well enough, according to what was practised in the case of *Graysbrook and Fox*, in *Plow. 283.* The same may be said in regard to the case where the jury omits in the first instance to find the value. *Vide Bl. Rep. 854. 2 vol.* From all these considerations it would follow, that the latter of these objections was a valid one, and that the proceedings in the case of *Merritt and Warmouth*, so far as regards that point, were not warranted by precedent; but whether these remarks be founded or not on solid principles, is to be known only by the event of future decisions, none upon this point having yet taken place in this country that have been preserved. The writer hopes it cannot be deemed presumption in any one of the profession, to have contributed his assistance towards the elucidation of a point which ought not to be misunderstood, or to be held in uncertainty; by exhibiting such ideas as occurred to him upon the reasons in arrest moved in the case of *Lewis and Williams*, and in consequence of his reflexions upon them afterwards; they may render the researches of others less difficult, and by that means enable them to go deeper into the subject when the point next occurs than if he had consigned them to oblivion, and left the subject dormant until

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NOTE.—The practice now used in our courts, in consequence of a decision some years ago at Bdenton, a demand previous to the institution of the action of detinue is required, but for what purpose is not clearly understood amongst the practitioners. It cannot be to entitle the Plaintiff to his action; for there have been several decisions that the act of limitations will run from the time that the Plaintiff knows the subject of controversy to be in the possession of the Defendant, and to be adversely claimed by him. Vide *Hillsborough, April 1792, Berry's Administrators v. Pullam, and Hillsborough, April 1794, Elwick's Executors v. Rush*. And this proves that a present right of action may be in the Plaintiff before the demand; for the act of limitations can only run from the time of the action accruing. To say therefore, that the act run from the time that the Defendant has an adverse possession known to the Plaintiff, is to say; that the action accrues to the Plaintiff from that time; it can therefore be of no other use than to entitle the Plaintiff to his damages for the detention and costs. And in our courts is given in evidence, instead of being replied as formerly, to a plea on the part of the Defendant, that he hath always been ready, and is still ready to deliver to the Plaintiff, accompanied with an offer to deliver instantly in court; or with a prayer that the court would appoint a day for the delivery. Vide 2 *Mo. Ent.* 427. 1 *Brown* 149. 1 *Roll. Ab.* 574. *pl. 4. pl. 5. Sayer's law of damages* 69. In which case, if the plea were admitted to be true, or not denied by replying, a former demand and refusal, and proving the same on trial, the Defendant was not liable to damages for the detention; but if our practice be accounted for this way, it will remain still a matter of difficulty to assign the reason why it is given in evidence upon the plea of *non detinet*; unless it may be said, that our practice requiring this evidence in every instance, takes away the necessity for that old plea and replication, and renders the pleadings more simple; and that the courts have gone beyond the extent and purpose of our rule of practice, where they have ordered nonsuits upon the deficiency of proof of the demand, which they must necessarily judge of themselves, and not leave to the jury to conclude upon, as they were used to do upon the evidence given on the replication.—For now the jury being charged only with the issue *detinet vel non*, must either answer in the affirmative or negative; and surely they could not say *non detinet*, merely because there was no demand proven, and thereby bar the Plaintiff forever. If the want of such proof could not justify them in saying *non detinet*, then it is not material so far as relates to the issue with which they are charged, for them to consider whether the evidence offered amounts to the proof of the fact intended to be proven by it or not; and as it belongs not to them to say, whether the Plaintiff shall be nonsuited or not, if he is nonsuited at all, it must be under the opinion of the court formed upon conclusions drawn from the evidence given, and that not material to the issue. So that so far as respects a nonsuit, the evidence is given necessarily to the court, to be judged of as to its amount only by them; which, whether it be more convenient and proper than the ancient mode, or more consonant to constitutional principles, may be a matter of some speculation. But if given in evidence only in place of the old plea and replication, and the jury are to determine upon hearing it, whether in fact there was a demand and a refusal on the part of the Defendant, and according to their conclusions upon that head, to proceed or not to assess damages for the detention, then

there would be less cause perhaps for impeaching our rule of practice: but this would effectually overthrow the practice of nonsuiting the Plaintiff, upon either a real or supposed deficiency in the proof of the demand. Suppose the Plaintiff refuses to suffer a nonsuit, and requires a verdict notwithstanding a deficiency of proof of the demand, having given full proof of his property, and the Defendant's detention—will the court direct the jury to find *non detinet*? If in support of the court's opinion, the Defendant should demur to the evidence, and thereby admit the facts to be true as sworn—would the court say, they were proper evidence of a *non detinet*, or a disproof of the detinue laid in the declaration, and adjudge the cause against the Plaintiff, although there was other competent proof fully and completely adequate to the proof of the contrary in all respects? And besides what judgment could the court give upon such a demurrer? Could they say that the evidence was incompetent to the maintenance of the issue he had undertaken to support, and that he should be therefore nonsuited? This is stating the matter in the most favorable point of view of which it is susceptible in support of the practice, perhaps more favourable than the rules of law will permit; for it is generally laid down, that the person demurring to evidence must admit that the circumstances offered in evidence, do amount to proof of the fact intended to be proven by them, and insist only that the fact when proven, is in law incompetent; and then the Defendant could not demur, but by admitting the demand and refusal; upon which admission, the court could not nonsuit for want of a demand and refusal; but if the Plaintiff would not agree to a nonsuit, and that could not be procured by means of a demurrer to evidence, then it would seem that the court have no power of nonsuiting, and of course that they ought not to hear evidence with that view, nor undertake to judge of its amount for that purpose; and that the evidence which is the subject of this investigation, when given, must be for the purpose of enabling the jury to decide upon the justice of allowing or disallowing damages for the detention. *Ideo quere.*

NOTE.—A variance between the writ and declaration is fatal in this State even after verdict. *Stamps v. Graves*, 4 Hawks 102. *Glisson v. Herring*, 2 Dev. Rep. 156.

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HILLSBOROUGH, APRIL TERM, 1795.

State v. Bromfield Long.

HAYWOOD and WILLIAMS, Judges, were of opinion that the taking which is to constitute a felony, must be a trespass. ASHE and MAYNAY, Judges, thought a borrowing with a fraudulent intent, might be the ground of a felonious act.

At this term the Defendant was indicted in the common form, for stealing a mare of one *Samuel Parks*, in the county of Randolph.

It appears upon evidence on the trial, that the Defendant was a stranger to *Parks*, but came to his house some time about the sixth of December last, offering himself to be employed as an overseer; and after re-

Apr. 1795. maining on *Parks's* plantation three or four days, he borrowed the mare in question of *Parks*, to ride to the house of one *Candles*, who lived about four miles from *Parks's*, in the same county; and he called at *Candles's* accordingly, riding the mare; but from *Candles's* went directly off, and in two days and a half arrived at a house in the county of Lincoln, at the distance of eighty miles from *Candles's*. Upon this state of the evidence, it was insisted by *Jones*, Solicitor General, that the Defendant was guilty of felony—he argued, that tho' there were some *dicta* in the old books, and even some adjudged cases, which make a taking that would amount at least to a trespass, to be an essential ingredient in the constitution of felony, yet that the more modern authorities have decided in many instances, and uniformly, that a borrowing or hiring with a fraudulent intent not to return the property to the owner, but to convert it to his own use, and a subsequent going off with the property, and selling it or not returning it to the owner, will amount to felony; and that in such cases the Court will charge the jury, to enquire, whether the borrowing or hiring was with such fraudulent intention; and if they found it to be so, then to find the prisoner guilty. In support of this position, he cited 1 *H. P. C.* 90, s. 5, 91, s. 10, *Kelyng* 24, 81, 85, *Leach* 95, 231, 266, 355, 213. *Mr. Potter*, for the prisoner, *e contra*, insisted, that a felony could not be grounded on a delivery by the owner to the borrower, but it must be a taking without the consent of the owner. He cited 4 *Bl. Com.* 250, 1 *H. H. P. C.* 504, 506, 507. And with respect to this point, there was some difference of opinion in the Court, and in their charges. Judge *MACAY* seemed to incline that it was felony. Judge *HAYWOOD*, that it was not. And the jury found a special verdict as follows: “The jurors now here sworn, upon their oath say, that on the sixth day of December, in the year of our Lord, 1794, in the county of Randolph, in this district, *Samuel Parks, sen.* was in possession of the mare in the indictment mentioned, as of his proper goods and chattels; and that on that day the aforesaid *Bromfield Long*, in the said indictment mentioned, did borrow the aforesaid mare of the said *Samuel Parks*, to ride to the house of *John Candles*, living in the aforesaid county of Randolph, about four miles from the house of the said *Parks*, and that he, the said *Bromfield Long*, was to have returned the mare to

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the said *Samuel Parks*, after riding her thither; and the jurors aforesaid further find, that the said *Bromfield Long* did get the said mare into his possession by the means aforesaid, and did ride her to the house of the said *Candles*, and that he did not return her to the said *Samuel Parks*; but forthwith rode the said mare into the county of *Lincoln*, to the distance of eighty miles from the house of the said *John Candles*, and there sold her to one *Andrew Hoyle*, as his own property. The jurors further find, that the said *Bromfield Long* did not take the said mare, or get her into his possession otherwise than is herein before stated. And the jurors aforesaid further say, that they do find that the said *Long*, at the time when he so got possession of the aforesaid mare as before stated from the said *Parks*, did the same with a fraudulent intention not to return the said mare to the said *Parks*, but to sell and dispose of her as aforesaid; but whether upon the facts aforesaid found, the said *Bromfield Long* be guilty of the felony stated in the indictment, the jurors aforesaid now here sworn are altogether ignorant, and pray the advice of the Court here thereupon; and if the Court shall be of opinion, upon the facts above stated, that the said *Bromfield Long* is guilty of the said felony, then the said jurors do find him guilty in the manner and form as stated in the indictment; but if upon the aforesaid facts above stated, the Court here shall be of opinion that he is not guilty, then the jury say that he is not guilty." (156)

This special verdict afterwards in this term was argued by *Mr. Jones*, for the State, and *Mr. Potter*, for the prisoner. *Mr. Jones* cited the same cases as before.—He observed, that one of the Court in giving the charge, had stated to the jury, that the authorities which went to implicate the prisoner in the guilt of felony, were modern cases; that the eldest of them was in 1775, and that many of them were since the revolution in this country; that all the cases previous to these cited from *Leach*, were the other way; and that in these cases the Court had gradually departed from the ancient law, and the law itself had thereby gradually become more and more severe, and this was owing to the circumstances of the country in which they were adjudged, the lower classes of the people there having none, or but little property, and being numerous; the higher orders on the other hand being rich, having preponderating influence in the

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Apr. 1795. government, and regardless of the other orders, had prevailed in extending the security of the law for the protection of property ; that perhaps also, property in that country being of more difficult protection, in proportion to the poverty and the number of the poor, was one reason that had its influence in effecting these changes ; and that as the same circumstances do not exist here, there is no necessity for the same rigour ; and that the old law, as laid down in *Hale* and the other books cited for the prisoner, ought to be adhered to—as to which remarks, he said he would observe, that these new cases are not introductive of any new law, or any alteration of the old, they only ascertain with more precision what the old law really was, and that one of the cases adduced to establish the doctrine he contended for on the part of the State, was cited from *Kelyng*, in the time of *Charles the second*, 81. and was founded on a decision in the time of *Edward the third* ; and as to the conclusions drawn from the comparative circumstances of England and this country, if there were fewer temptations to commit frauds here than there were there, there was more turpitude in committing them here than there, and of course the crime should be treated with more severity here.—He concluded with praying judgment of death against the prisoner.

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The Court thought, as there was a division in the opinion of the Judges now present, it was proper that this special verdict should undergo the consideration of all the Judges : they therefore ordered the prisoner to be recommitted, and that the Clerk of this Court transmit a copy of the special verdict to each of the Judges of this State ; and that they be requested to return their opinions to this Court at the next term.

At the next term, October, 1795, the opinion of all the Judges was had on this special verdict ; the Judges **ASHE** and **MACAY** were of opinion it was felony ; **WILLIAMS** and **HAYWOOD** that it was not ; and the prisoner was recommended to mercy, and obtained his pardon.

NOTE.—The criminal code above all others should leave nothing to the discretion of the Court or jury, but should be regulated as far as the nature of things will admit, by certain and fixed rules, not difficult to be understood, and incapable of being construed away. The rule laid down in *Coke*, *Hale*, *Hawkins*, and *Blackstone*, that there must be a taking *invito domino* ; and that there can be no felony without a trespass, is a plain rule comprehensible by every capacity, and in its nature not easy to be misconstrued—it leaves no latitude to the Judge, nor any to the jury. The plain enquiry is, a tortious taking—but

should the question be, did he borrow or hire with an intent to steal? Apr. 1795. That being an act of the mind, and to be discovered by circumstances only, leaves the fate of the prisoner entirely in the discretion of the Court and jury. In the case of a man of good character, or one they were inclined to favor, a borrowing and selling afterwards as his own, might easily be deemed innocent, or at least excusable—he might be supposed to do it, with a design to make a good bargain for the owner, and to deliver the money to him; or from confidence of his assent to the act when made acquainted, or were he acquainted with the circumstances which determined the conduct of the borrower and the like; when before the same Court and jury, another of but indifferent character, or where they were not disposed to favor, for borrowing and then selling, or for borrowing and not returning, might be sentenced to death; which difference of decision would be owing to no other circumstance, but that of the discretion exercised by the Court and jury. But this discretion drawing the lives of men into its vortex, can never have place if the old rule be adhered to. The rule contended for on the part of the State, vests an arbitrary power over the lives of the citizens in the Court and jury—a power that ought not to be vested any where—which it is for the honor of the Court to disown; and which, in whatever form or shape it may endeavour to insinuate itself, should forever be rejected with manly firmness by the Judges of a free country. The discretion of the Court is the mortal enemy of all safety and security to individuals.—It is the engine that all governments professing to be regulated by laws, have used to elude them, when the oppression of an individual is the object. Besides, the old authorities are founded upon better reasons than the cases cited from *Leach*—laws are, or ought to be, rigorous, only in proportion to the magnitude of offences, and the difficulty there is in preventing them; but with reasonable care in the owner, an offence of this kind can never happen—let him not lend his property to a man he does not know, or in whom he cannot safely confide, and he will never be deceived in this manner; but if he will lend it to a stranger he does not know, and that stranger deceives him, he should blame his own imprudence—he has contributed to the deception himself, and he has no right to expect the law to animadvert with the same severity on the conduct of the deceiver, as if himself had been perfectly passive. The man who has not trusted his property into precarious hands, and who does what is usual to secure it, and yet has it invaded by a taking away without his consent, is surely more to be regarded, than the man who has lent it. In the one case the owner contributes in no shape to the offence, in the other it could never have been committed had not the owner put it in the power of the prisoner to commit it; and surely in point of reason and good sense, there is amply sufficient to warrant the distinction made in the old cases. I did say to the jury, and I believe still, that the modern cases cited on the part of the State, have grown gradually into still greater and greater severity, owing to the circumstances of England and the British people at the times when they took place. In every country as wealth accumulates poverty also increases, still forming a wider separation and greater distance between the different classes; and the natural consequence of this every where is, that the hand of government clinches the sword of vengeance against the violation of the rights of property with the stronger grasp, and strikes with the less compassion; and it is obviously remarkable, that each of the succeeding cases of those cited, has gone still further and wider of the old rule than the former; so much so, that if the latter of them should be presented as a proposition, without the former, to fa-

Apr. 1795.  miliarize the mind and prepare it for the reception of the latter, we should be startled and reject it without hesitation—such for instance as that where a man hired a post-chaise, and not returning it, was taken up a year afterwards, and convicted of felony. This at first view would appear horrible—how many circumstances might have occurred to prevent the return within that time—the very negligence and idle disposition of the man might have caused the delay. The departure from the old rule when first made, seemed to come so near it, that the departure did not strike the mind with much force—the next departure came so near the last precedent, that that was not much remarkable, until at length the old rule becomes entirely laid aside, and the modern authorities boldly pronounced to be the genuine rules, and to be properly explanatory and corrective of them—then is the time when the life of the subject or citizen is exposed to the attempts of evil men, and there is no helper at hand to protect them—this is the progress of a departure from ancient well established rules. The smallest reflection upon it is sufficient to convince us how dangerous an experiment it is, either to abandon them, or to extend them by construction to cases not manifestly and obviously within them. This is the only operation the cases cited have upon my mind, and they confirm me in the opinion that the old rule should be most sacredly regarded. If we once begin to depart from it, we shall gradually include in the definition of felonious stealing, acts that are at present deemed very far from its comprehension, until at length perhaps, the boundaries between fraud and felony, shall be no longer discernable; and the lives of many citizens sacrificed improperly, before the law can be again brought back to its ancient simplicity and certainty. It is true the case in *Kelyng*, p. 81, does accord with the cases in *Leach*; but the case in *Kelyng* is but his own extra judicial opinion; and that opinion too against an adjudged case reported by himself in page 24; in which latter case, he himself and two other Judges concurred.—This opinion of his seems not at all to have been noticed as law, or as creating a doubt with respect to the law in subsequent authors; and therefore there is abundant reason to treat it at this day, as the solitary effusion of his imagination; he himself in his judicial capacity has contradicted it, and all following authors of any celebrity, have passed it by in silence.

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NOTE.—Vide *Dodd v. Hamilton & Hamilton*, N. C. Term Rep. 31.

Robertson v. Stuart.

A slave wrongfully taken out of the possession of A, and sold to B, and while in the possession of B, sold by A to C, may be recovered by C, in a suit brought in his own name.

This was an action brought for the recovery of a negro boy. It appeared upon evidence, that old *William Stone* was the owner of the boy, and that his son *John Stone* being about to move to South-Carolina, had gotten the boy into his possession; and that he sold him as his property to the Defendant; and that the Defendant had retained the possession of him as his own ever since; that after the sale, and whilst *Stuart* had him in possession, the old man demanded him, and then sold him by a

bill of sale executed to *Robertson*; that then *Robertson* Apr. 1795.
 demanded the boy of the Defendant, and soon after brought this suit in his own name. The exception taken at the trial, and afterwards in arrest of judgment, was that this negro when sold by the old man to the Plaintiff, was a chose in action, and not transferable; and that therefore *Robertson* could not maintain this action in his own name. *Mr. Whyte* cited for the Defendant *Com. Dig. Verbo. Assignment*, and 1 *Bac. Ab.* 157, and *Co. Lit.* 211, a. 266. a. *General Davie*, for the Plaintiff, contended that the negro in question was not a chose in action, for a chose in action means only a thing or subject of dispute, so situated that the person entitled has no other means of obtaining the possession but by an action at law, and excludes the idea of recaption, or getting a lawful possession by the act of taking it without the immediate aid of law—as in the case of a bond or other instrument for the payment of money, the obligee could not take the money without the assent of the obligor tho' it lay before him, and he has no other means of obtaining the money but by a suit at law: this definition will not apply to cases of specific property, in which the owner is not absolutely driven to a suit at law to gain possession, but may take the thing in dispute into his possession wherever he can find it. This circumstance constitutes the difference between a chose in action, which cannot be taken, and a subject of property that may. He cited 2 *R. Ab.* 45, 46, and the opinion of *Justice Buller* in 4 *Term Rep.* 340. In which opinion it is said, that the rule of a chose in action not being assignable, is not founded on good sense; and that the law at this day will protect the assignment of a chose in action, so as not to suffer the assignor or his contracts, to defeat or impair it; and that only so much of the rule now remains as respects the form of action, and directs that it must be carried on in the name of the assignor, and that is now looked upon in Courts of Law to be carried on for the benefit of the assignee. He argued that the rule now contended for by *Mr. Whyte*, was adopted in England in very ancient times, when the Lords were rich and powerful, and the other orders of men poor and indigent, before the diffusion of property introduced by commerce, and at a time when it might reasonably be apprehended, that the influence of a powerful Baron, being an assignee, might be too weighty for a poor Defendant, even

Apr. 1795. though he might have justice on his side; but since the circumstances of the people have been ameliorated by an influx of wealth, and a consequent equality of fortunes and of weight in the government, the influence of the nobles hath gradually declined in England, until it is now no longer an object of legal jealousy, and the rule against the assignment of choses in action hath been gradually relaxed and found to be of less use, until it has come to be thought not only useless but inconvenient. In this country, these circumstances which gave birth to the rule have never existed, much less can they be said to exist at this time, when there is a perfect equality amongst the citizens of the country in respect of their legal advantages. There is even less reason for the rule here than in England at this day, and therefore beside the point that the negro in dispute did not agree with the definition of a chose in action, he said it might be very justly doubted whether the rule itself was such an one as our law would recognize. He argued further, that the circumstances of the ancient villains in gross in England, and of our slaves, were similar in most respects; and that in the times of villainage in England, a man could not in law be disseised or dispossessed of his villain in gross. *Co. Lit.* 306, 307, *Lit. s.* 541. In those books it is laid down, that a man may be dispossessed of his ward, but not of his villain in gross. And the action *de nativo habendo* used for the recovery of villains, was very similar in its principles to the action of detinue that we use for the recovery of slaves. And if in England a man could not be said to be dispossessed of his villain, the same ought certainly to be the case with a slave here. And the owner cannot be legally said to be dispossessed of his slave, then it will follow that although at the time of this sale to the plaintiff, the defendant had actually the possession of the negro, yet the legal possession was in *Stone*, and so the negro not a chose in action, even according to the idea entertained of it by the defendant's counsel. This distinction is founded in nature, and the difference between this species of property, and every other kind known to the avarice of men. A flock of sheep or a horse is a passive subject, the arbitrary will of the possessor designates its condition absolutely, either as the property of another, or his own. But a slave is a rational creature, possessed of a will capable of directing his actions, and the

law will not leave it in his power to change the absolute Apr. 1795.
property of his owner into a mere right of action when-
ever he pleases, by running away and putting himself
under the roof, or on the plantation of a stranger.

Mr. Whyte.—As to the definition of a *choses in action*, as given by the counsel on the other side, the case in *Com. Dig.* states a lease of sheep for two years, and a sale of the lessor during these two years, and held ill. In that case, the vendee of the sheep after the two years might have taken them, yet were they held to be *choses in action*. *Co. Lit.* 214, *a.* states a right of entry into lands, and says it cannot be assigned; and in that case, the person having a right to enter need not bring his action, he may take possession when he pleases, without the immediate assistance of the law. As to the rule itself, the object of it is to repress litigiousness, and that is as necessary here as in England, or any where else. As to the authorities relative to the villein in gross, he was not apprized of their being intended to be produced, and was therefore not prepared to answer them; but it seemed to him, that the cases of villeins in gross in England anciently, and of the slaves of this country, were widely different. A villein in gross was an inheritance, and passed by deed, and the action to recover him was a writ of right, or a writ *de nativo habendo*. And the reason why a man could not elect to suppose himself dispossessed of a villein in gross, perhaps might be owing to this, that he was not allowed to bring an assize or writ of entry for a villein in gross; but must betake himself to the writ *de nativo habendo*, and more especially as in the case of a ward, where the wardship was considered as a chattel interest. *Co. Litt.* says he may be dispossessed, and doubtless this distinction arose from the circumstance of being able to bring a personal action in this case, when in the case of the villein in gross, it was otherwise; and the lawyers were obliged to use terms expressive of the real quality of the thing to be recovered. Whether these conjectures however are near the truth or not, it would be a strange doctrine to adopt at this day, that a man could not be dispossessed of his slave, after so many actions of trover and detinue have been brought for the recovery of slaves, and after it has been considered for so great a length of time, that an adverse possession of slaves for the length of time mentioned in the act of Assembly concerning limitations of

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Apr. 1795. actions, will bar the owner's action. How can this be any longer effected, if the legal possession continues always in the owner, notwithstanding a dispossession in fact? Such a doctrine as this, would overturn the act of limitations with respect to slave property entirely, and would render it more insecure than any other species of property whatever. He therefore could not believe it to be founded on principle, and concluded with praying that judgment might be arrested.—*Curia advisare*.

And at October term, 1795, this cause was again argued, as I have understood from the counsel, and there was a judgment for the plaintiff, *per* Judges ASHE and MACAY.

NOTE.—It is certainly true, that according to the notions of the ancient law relative to villeinage, a man could not be dispossessed of his villein; he cannot be disseised or dispossessed of an incorporeal hereditament. *Salk.* 666. *Co. Litt.* 32. And such was a villein in gross. *Co. Litt.* 121 *Gilb. on Ten.* 74, 75. *Co. Litt.* 306, b. But the *nativo habendo* bore no resemblance to the writ of detinue, though it had the clause *nec quis detinent*; it was directed to the Sheriff against no person in certain, and was removable by *pone* or *libertate probanda*. F. N. B. 186, 187. It was contestible by the villein himself, by pleading his villeinage. F. N. B. 190, 186. And the aim of the *nativo habendo* is against no one but the villein himself, not against any third person, in whose service or actual possession he may be. F. N. B. 191. *Sullivan* 317, 319. For this latter purpose, other writs, considering the villein as an incorporeal hereditament, were used.

NOTE.—*Vide Morgan v. Bradley*, 3 *Hawks* 559. *Stedman v. Riddick* 4 *Hawks* 29, which latter case seems *contra*.

In Equity.

The Court adopted this rule, where an injunction, bill and answer have been read, and the injunction dissolved, and no replication nor commissions within two terms after, the bill shall be dismissed for want of prosecution; and accordingly, many injunction bills were dismissed at this term for want of prosecution upon the above rule.

(163) Also in a case before the Court, where the complainant had died, it was said by Mr. Moore, and conceded *per curiam*, that since the act of 1786, if the complainant dies, the defendant is not thereby out of Court, or the suit abated; but it is continued in Court for two terms next following, by the force of that act; and at either of these two next terms, complainant's representatives may come into Court, and move to be made parties, and be admitted parties on record to carry on the suit; and within

these two terms, there is no necessity for a bill of *revivor*—but if the party applying is not the legal representative entitled to carry on the suit, his application may be controverted by the other party, and drawn into the judgment of the Court by plea, as well as if there was a bill of *revivor*. And the Court seemed to incline, that if the interest of the complainant had gone by devise or will, or other legal transfer, to any other person than to him who is constituted by law, that then such person must state that circumstance to the Court in a bill to be brought for the purpose.

NOTE.—*Vide Avery v. Branch*, post 369. Anonymous, post 451. *Dalbign v.* — 2 Hay. 296.

Mann Patterson v. Mark Patterson, et. al.

Tenant in tail in remainder, is entitled, under the act of 1784, to the fee. *Quere*, by Haywood.

Complainant's grandfather, by deed duly executed and registered in proper time, conveyed to Complainant's father, a tract of land of six hundred and forty acres, to him and the heirs of his body, reserving to himself, the grandfather, a life-estate therein. He continued in possession of the land and of the deed till his death, which happened in 1786; and the bill stated that *Mark Patterson*, his executor, had taken possession of this deed amongst the other papers found at the old man's death, and had suppressed it. The bill was taken *pro confesso*, as to *Mark Patterson*, for want of an answer. The other Defendants answered and confessed the deed, and disclosed strong circumstances to induce a belief that *Mark Patterson* had gotten the deed into his possession and suppressed it. He was the heir at law, and upon this case a doubt was conceived how *Mark Patterson* should be decreed to convey, whether in fee, or to him and the heirs of his body. The act of 1784 declares, that all persons who, at the time of passing this act, were seised or possessed in general or special tail, should be held and deemed to have a fee; but in this case, the donor was seised of a life-estate in the lands at the time of passing that act, and the doubt was, whether the remainder man could be said to be seised of the estate tail at that time; this remainder was vested, and had it depended upon a particular estate for years, the freehold would have passed at the time of livery and seisin, or what in

Apr. 1795. this country is equivalent thereto, made to the former, and then the remainder man would have been seised in tail; but in this case, the freehold having not been passed to him, but remaining in the tenant for life, it seemed to some of the Court, that the donee was not seised in tail as the act requires, and then the estate tail was not converted into a fee by the operation of that act: but the other Judge being very clear, notwithstanding this doubt, that the act had vested a fee in the tenant in tail, in this case it was ruled *hesitanter*, that he should convey to Complainant in fee—and so it was decreed.

Sed quere—For suppose it had been to the grandfather for life, remainder to the son in tail, remainder to another in tail, this would have been a vested remainder in both; and if the remainder man in tail is to be seised in fee, merely because his remainder is vested, then the latter remainder man is equally entitled to the fee with the former, and the operation of the act would be absurd, to vest a fee in the latter remainder man, and destroy his interest at the same time, by vesting a fee in the former; but if the meaning of the act be, that an estate tail in possession only, shall be converted into a fee, there seems to be no such absurd consequence; the estate of inheritance, it is true, would be rendered unalienable during the lifetime of the tenant for life, and the law allows of the same thing for the convenience of families in executory devises; and the same convenience may justify such a construction of the act—to that degree, that if in the case supposed, the first remainder man had died without issue, in the lifetime of tenant for life, the land might have gone over according to the limitation of the donor, and the second remainder man have become seised in fee, by virtue of the act. Whether it was not the intention of the Legislature to leave such a power of disposal in the owners of fee-simple lands, is perhaps worthy of some enquiry.

NOTE.—In the above statement of this case, there seems to be some circumstance omitted, as the deed was registered there was no absolute necessity for a decree. The reporter thinks the necessity for a decree was occasioned by a destruction of the register in the time of the war, which rendered it impossible to procure a copy of the registered deed.

v. Arrington et al.

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The purchaser of a *chose in action* for a valuable consideration will be protected in Equity.

The bill stated in substance, that the negro in question was given by old Arrington, now deceased, to his daughter, one of the Defendants, now married to another of the Defendants; that she and her husband, for a valuable consideration paid to them by the Complainants, had by deed poll, assigned and transferred their interest in said negro to the Complainant; that old Arrington, the father of the Defendants, had died, leaving the Defendant, Arrington, his executor; that he had gotten possession of the negro and detained him; that the Complainant, in the name of the feme and her husband, had brought detinue against the Defendant, Arrington, to recover the negro; and that the feme and her husband being indigent, and in insolvent circumstances, threatened to enter a retraxit in the suit at law, or to execute some writing to the Defendant, Arrington, that would operate at law as a discharge of the action. The Defendants demurred to this bill; and upon argument, the Court said, this is a *chose in action*, purchased for a valuable consideration paid by the Complainant, and a Court of Equity will protect it. If the Defendant could procure a retraxit from the Plaintiffs at Law, or a release of the action from them, the Complainants, who carry on the suit in their own name, would be totally defeated. If the Court of Equity, who ought to protect this assignment, being for valuable consideration, would not interpose as prayed by the bill, the Complainant, as the bill states, would be defeated by a fraudulent contrivance between the vendors who have received value, and the Defendant who knows they have. This would be a fraud in the very face of the rules of a Court of Equity on the subject of assignments. The Court therefore were of opinion, the bill was proper, and ought to be answered, and overruled the demurrer, and ordered the Defendants to answer accordingly. (165)

NOTE.—Vide 2 Black. Com. 442. 1 Term Rep. 25.

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The Executors of——— v. Samuel Oldham.

Where an executor declares as executor, there he makes proffert of his letters testamentary, and they are to be objected to in pleading upon oyer of them, or by demurrer, if any defect appears in the declaration; and after the first term, they need not be produced again. But, where an executor declares upon his own possession, the fact of executorship forms part of his title, and must be proved upon the trial by the production of the letters testamentary themselves; unless they have been lost, when, perhaps, other proof of executorship will be admitted.

Detinue for negroes in the Plaintiff's own possession. The Plaintiff proved the wench from whom these negroes were descended, to have been the property of the testator; that she continued to be his property, and was in his possession at the time of his death; that after his death, she came into the possession of the Plaintiff, as his executrix; that she was brought from Virginia secretly by a man who had married her daughter, and disposed of by him to the Defendant: that they were demanded of the Defendant previous to the commencement of this action, who confessed he had three boys in his possession which were the children of that wench. This being all the evidence produced by the plaintiff, *Mr. Moore*, on the part of the Defendant, moved, that the Plaintiff might be nonsuited, for want of the letters testamentary to prove the Plaintiff's executorship and qualification. *Et per curiam*, after much argument, if an executor declare as executor, then in the declaration, at the end thereof, he makes a proffert of his letters testamentary to the Court, and then in contemplation of law, they are in Court during all that term, according to *Wymack's case*, in *Coke's Reports*; and during that term, the Defendant may demand oyer of them, and on their being produced, may either deny them by plea, or by plea shew that they are invalid, as not being granted by the proper jurisdiction, or for other defects: or if the declaration does not set forth a proper jurisdiction for granting them, and they appear to be granted by the improper jurisdiction, he may demor; but if oyer is not then craved, and advantage taken for want of the production, or for any defect in them, but the party defendant pleads in chief, or any plea posterior in point of order to these, that question the plaintiff's right to sue—then the letters are admitted, and the Plaintiff at the end

of the term, may take them out of Court, and need not produce them any more. But where the executor declares upon his own possession, and not as executor, then he does not make a profert of the letters testamentary in his declaration, and the Defendant cannot crave oyer and take advantage of them, or for the not producing them before he pleads, as in the other cases—and therefore, in this latter case, the Plaintiff must shew his right to recover on the trial, and this he cannot do but by shewing the property to be in him as executor; proof of which must be made by shewing the letters, and then the Defendant may contest them, not having before admitted them by pleading; and for this the Court cited *Buller* 48, 246, 108. 2 *Nels. Ab.* 626. *Hib.* 38, 218. *Salk.* 37, 38.—*Mr. Williams*, for the Plaintiff, then offered a copy of the testator's will, attested by the Clerk of the proper county, and his clerkship regularly certified by the presiding Justice, under the title of Chief Justice of that Court; and at the end of this copy, it was also certified, that the Plaintiff had given bond according to law, and taken the oath, and had a certificate for obtaining the probate in due form, but she had not any letters testamentary to produce; and he insisted he had sufficiently proven the executorship of the Plaintiff, the copy of the will shewing she was appointed executrix, and the Clerk's certificate shewing she had taken upon herself the execution thereof; and that it was not the practice either in Virginia or in this State, actually to take our letters testamentary; and even in England, where they are taken out, the executorship may be proven by a copy of the will and probate. *Buller* 247, or the probate in the Register's book. *Buller* 245, 246. But *per curiam*, it is a mistake to say, that letters testamentary are not taken out in this State and Virginia; they are often taken out when suits are to be commenced out of the state or county where the testator resided. The Plaintiff's executorship is to be proven by testimony produced by himself, and the letters themselves must be produced, the issuing of them being the final act that makes him a complete legal executor. Until they issue, his executorship is inchoate and imperfect, and in embryo only, liable, notwithstanding the intermediate acts, to be questioned, and all further progress stopped. If the executor could prove the letters to be lost, then perhaps he might be admitted to a proof of the executorship

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Apr. 1795. by a probate or copy, or if the executorship were to be proven by a third person, then perhaps such proof might be allowable; or, under some circumstances, even proof less satisfactory. And this reconciles the cases cited from *Buller* 245, 246, and is proven to be the true doctrine by the passage in the same book 108, where he cites 1 *Liv.* 25. *Cro. Eliz.* 18, and the case of *Lewis & Brag, Mich.* 16. *Geo.* 2. Therefore the proof offered in the present case is not sufficient, and she must produce the letters, unless she can prove them lost or destroyed by accident. Mr. Williams then saying he could not make such proof, the Court recommended the withdrawing a juror; and a juror was withdrawn by consent.

NOTE.—Vide *Berry's adm'rs. v. Pulliam*, ante 16.

Patterson et al. legatees of Patterson, deceased v. Mark Patterson and Sellars, Defendants.

A person made a party defendant in a bill, who is not compellable to answer, and against whom no relief is sought, may have the bill dismissed as to him.

The bill stated a will made by the deceased, containing dispositions of the testator's property, which went to the Defendant, *Mark Patterson*, or at least a considerable part thereof, in case of the deceased's intestacy. It stated that *Mark Patterson* and *Sellars* (who it did not appear had any interest in the destruction of the will) had fraudulently, and with intent to secrete the same, gotten possession of the said will, and secreted it. *Sellars* demurred, because the charge in the bill, if true, subjected him to a criminal prosecution, and that he was therefore not bound to answer, and there was no relief prayed in the bill as to him.

(168) It was argued at the bar, though it might be true, that he was not compellable to answer, that was no proof but that he might be continued in Court—for if the Complainant could prove the charge, he might have a decree against *Sellars*, notwithstanding he was not obliged to answer; and for this was cited *Mitford* 64, 65. 2 *Ves.* 246. *E contra*, it was argued, that it was admitted he could not be compelled to answer, and that as the bill prayed no relief against him, there could be no reason for keeping him any longer in Court.

Per curiam.—It seems a little contradictory, that this man might be compelled in a Court of Law to answer

this charge upon oath, as he might be by 1777, c. 2, s. 62. Apr. 1795. and that a Court of Equity should not have as large a power for the discovery of such a fraud; but with some reluctance the Court allowed the demurrer, and dismissed the bill as to *Sellars*—for no relief being prayed in the bill against him, and he not being compellable to make a discovery, it was useless to keep him longer in Court.

Cooke v. Little & another, sureties on an appeal bond, for Whitney.

Suit in the County Court, and judgment for Plaintiff; appeal by Defendant to the Superior Court, with A, and B, securities to the appeal bond; before judgment in the Superior Court, the bail below surrendered the Defendant, and he was committed; after judgment in the Superior Court, the Defendant being gone, *sci. fa.* issued to the sureties in the appeal bond, and it was held, that the surrender by the bail did not discharge them.

The Plaintiff had sued *Whitney* in the County Court, where he had given bail. Upon the trial of the cause there, the Plaintiff obtained a verdict, and *Whitney* appealed, and gave an appeal bond as the law directs, with the present Defendants his securities. The cause was removed to the Superior Court, and entered upon the docket of that court; and pending the action here, and before judgment, the bail below surrendered *Whitney* in this court, and he was committed to jail. Afterwards, the Plaintiff obtained a verdict and judgment here also, and *Whitney* being gone, the Plaintiff took out a *sci. fa.* against the Defendants, to subject them to the payment of the money. The Defendants pleaded the surrender of *Whitney* by the bail, and his commitment to jail thereupon. The Plaintiff demurred; and now the demurrer was argued by *Moore*, for the Defendant, and *Davie*, for the Plaintiffs. The reason why this cause had been brought before the court by *sci. fa.* and pleading thereto, was, because a motion had been made at a former term in behalf of the Plaintiff, for leave to enter up judgment *instantly*, pursuant to the act of 1785, c. 2, s. 2, which directs that "bonds taken for prosecution of appeals with effect, shall hereafter make part of the records sent up to the Superior Court; on which judgment may be *instantly* entered up against the appellant and his securities;" which motion was then refused, and the Plaintiff directed to take out a *sci. fa.* The cause was

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Apr. 1795. now very well argued on both sides ; the argument is here omitted, lest some material part should be forgotten, it being very lengthy on both sides.

Et per curiam.—The act of 1777, c. 2. s. 76, directs bail to be given at the commencement of a suit in the County Court, and also that such bail may surrender the principal in discharge of themselves at any time before final judgment obtained against them. s. 20. It allows either party an appeal to this court. s. 82. but requires the appellant to give bond, with sufficient sureties, for the prosecution of such appeal with effect, and for performing the judgment, sentence and decree which this court shall make or pass thereon, in case such appellant shall have the cause decided against him ; but the act makes no provision for any surrender to be made by these latter securities, which is a proof that the Legislature did not intend that they should be dischargeable by means of a surrender. Had this been their meaning, they certainly would have declared it, as they had the subject of surrender under their consideration ; and made provision for it in certain cases in this very act. The act probably goes upon this reason, that the Plaintiff having by a suit at law, and verdict in his favor, established the probable justice of his demand, the Defendant ought then to be held to more strict terms than at the institution of the suit, before there was any presumptive evidence on record against him. The Legislature probably thought it reasonable, after such evidence, that the Defendant should not have it in his power to defeat the Plaintiff by conveying his property to other creditors, or by wasting it during the pendency of the appeal ; which event, combined with the circumstance of an intermediate surrender by the bail, would leave the Plaintiff entirely remediless, were it not for the security he has by means of the appeal bond. At the same time that they allowed the privilege of appealing to the Defendant, they were solicitous to provide against every possible inconvenience that might result from it to the other party, and this they have intended to effect, by requiring an appeal bond with condition for prosecuting with effect, or paying the condemnation in case of a judgment against the appellant. This secures the Plaintiff at all events, and against all practices to his prejudice. The sureties for the appeal therefore cannot surrender, nor can they be discharged by the surrender of the bail.

Much argument hath been used respecting the meaning of the act of 1785, c. 2, and it hath been contended, that the appeals there spoken of, are from judgments and verdicts rendered in actions subjected by that act to the County Court jurisdictions, and not appeals from all actions in general. The title of the act, and its preamble, it is true, only looks to the enlargement of the County Court's jurisdiction; but the provisos in the first clause, and the second clause, relate to appeals in general, and are to be taken to be in *pari materia* with the act of 1777, c. 2. They are both parts of one whole, and these parts of the act of 1785, have a reference to appeal bonds taken pursuant to the act of 1777. This is plainly evinced by the preamble or introductory part of the second clause. "And whereas from the manner in which appeals from the County Courts of Pleas and Quarter-sessions have been heretofore obtained in numerous instances, frequent injustice has happened to many just suitors, from the delay incident to said appeals." This is the most unequivocal reference to abuses committed in the prosecution of appeals previous to that time, that language can signify, that is to say, to the prosecution of appeals taken pursuant to the act of 1777; and for the remedying these abuses, it directs appeal bonds for the future to be sent up as a part of the record; but it does not direct any new species or form of bonds. It is additional to the act of 1777, which did not provide for the sending up such bonds, and the consequence of their omission frequently was, that the bonds were lost or mislaid, and the remedy upon them frustrated, to the prejudice and loss of the appellees. The act of 1777 did not ascertain the mode of proceeding upon appeal bonds by the appellee, when it should be necessary to proceed upon them, whether by a new action of debt, by *sci. fa.* by a motion in court for judgment, or how otherwise; and of course doubts were entertained upon that point. The act of 1777 imposed no penalty by way of restriction upon vexatious and unjust appeals, prayed sometimes for the mere purpose of delay, at others for the purpose of gratifying a litigious disposition. All these omissions are supplied by the act of 1785, appeal bonds by that act are to be a part of the record transmitted to the Superior Court; the appellee may enter judgment upon them *instantly*, by motion to the court; and if the judgment below be affirmed, the appellant shall pay interest at the

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rate of twelve and a half *per cent.* for his delay. And if the act of 1785 relates to appeals generally, the arguments built upon the contrary position must all fall to the ground. It was argued for the defendants, that the commitment of their principal after his surrender by the bail, was a commitment in execution, and that there can be no *fi. fa.* against the sureties after this. None of these statements are just—he was not, nor could he be committed in execution, because at the time of the surrender there was no judgment against him : but suppose him to have been committed in execution, it will not follow that that operates as a discharge of his sureties, any more than in the case where there are three obligors to a bond, and one is taken and imprisoned in execution for the debt, that will not discharge the others. 5 *Rep.* 86. 1 *Roll. Ab.* 903. *pl.* 21. Nothing short of payment, or a release, will discharge the co-obligors in such case—had he been in execution, and been discharged by the Plaintiff, that might have discharged his sureties ; but a man can never be in execution till after judgment, and a prayer for that purpose entered on record, and the prayer allowed by a *committitur* entered on record, when a principal is surrendered by his bail—for if he could be in execution merely by a surrender without prayer of the Plaintiff, he might then take advantage of the insolvent debtor's act, and also might preclude the Plaintiff of the benefit of a *fi. fa.* when perhaps at the time of the surrender, the Plaintiff might know that in a little time to come, he would have property enough, as by the death of relations, marriage or other means—and should he be once in execution by his body, the Plaintiff could never afterwards during his life, have a *fi. fa.* and therefore the law will not say he shall be in execution—for the Plaintiff, even upon a surrender after judgment, unless the Plaintiff chuses that he shall be so ; which choice must be manifested by a prayer on record. And if he be imprisoned upon a surrender, for instance to the Sheriff out of court, the court will release him from his imprisonment after judgment, unless the Plaintiff, in a reasonable time, apply to charge him in execution. But upon this last point, though the court seemed to be very clear, *Mr. Moore* still thought the law was otherwise, and pressed for further time to argue it ; which was allowed him by the court, and the argument did not again come on during this term.

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An appellee may move for an affirmance of the judgment with double costs, either at the first, or any other term after the appeal. *Per* MACAY, Judge. But HAYWOOD, Judge, denied the propriety of it, and a rule upon the appellant to show cause at the next term, was ordered.

Mr. Norwood moved to have leave to enter up the affirmance of a judgment of the County Court, upon an appeal taken from thence to this court. The appeal was returnable to last term, but no motion was then made for the affirmance. The appellant had failed to bring up the appeal fifteen days before the term. Judge MACAY—To the best of my remembrance, it has always been the practice to enter up judgments, as now moved for, at any time. Judge HAYWOOD—Whatever may have been the practice I cannot say, not having attended to it in this particular—sometimes a practice may prevail for a length of time, upon the strength of a precedent passing *sub silentio*, which, when it comes to be examined may be found very erroneous. Where an appeal is taken, both the appellant and appellee, have the first day of the next term of the Superior Court given to them for their appearance in court, and by that means they are both in court that day—the appellee to move for the affirmance of judgment, and the appellant to defend himself against the motion, by shewing any good cause he may have against it, as payment, release or the like, since the appeal taken. The act of 1777. *ch. 2. sec. 84.* directs, that the appeal shall be brought up fifteen days before the sitting of the term, for this reason principally, that the appellee may have sufficient time, after knowing the appeal is intended to be prosecuted, by its being filed in the office for that purpose, to prepare himself for the trial, or if not filed, then to procure from the Clerk of the County Court a transcript of the record, and thereupon move for the affirmance; but if the first term of the Superior Court passes without any such motion for the affirmance, and without putting the cause on the records of this court, and continuing it to the next term, the parties are both out of court; and one of them cannot move against the other, without bringing him into court again by some new process. *7 Rep. 30 a.* It would be productive of great mischief, could the appellee

Apr. 1795. at any distance of time, in the absence of the appellant, he at liberty to take a judgment against him upon a mere motion to the court. By such means a judgment might be entered against a man, upon an old dormant County Court verdict, after he had moved out of the country, and perhaps satisfied the demand; or when the Plaintiff had discovered his evidence were lost, and all the property he had here be swept away, before he could have the least intimation of it. I am very clear, if the practice spoken of has prevailed, that it is repugnant to an universal principle of law and justice, that no man shall be condemned *ex parte* or unheard, as well as to the true meaning of the act—therefore I cannot yield my consent to the motion; but I am willing you should take a middle way—you may give notice to the appellant of the intended motion for affirmance to be made at the next term; and at the next term prove the service of this notice by affidavit filed in court, and then renew your motion, and the court will then consider it—you may have a rule entered for this purpose—so the rule was entered accordingly.

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NOTE.—*Vide Brickell v. Bass, ante 137.*

Cain v. Pullam.

Action on the case for slanderous words. This cause was referred by rule of court to arbitrators, who awarded in favor of the Plaintiff, and returned their award into court. These exceptions were taken thereto in writing, filed by *Gen. Davie*, the principal of which were, that the arbitrators proceeded without declaration, notwithstanding the Defendant insisted it should be produced. These being filed, a day was given by rule of court for hearing the exceptions. They were answered in writing also, filed by *Mr. Moore* for the Plaintiff, and on the appointed day were brought before the court. The exceptions of the Defendant were supported by affidavit—they were contradicted by the affidavits of one of the arbitrators, and of one *Smith*, who had been present. These persons swore that the Defendant made that objection, upon which the arbitrators stopt in order that it might be produced; then the Defendant consented they might proceed without the declaration, stating the words spoken as laid in the declaration, which the other party agreed

were the words stated therein. Upon this the court ^{Apr. 1795.} overruled the exceptions. This case is reported to shew what is the practice in such cases in our courts.

Hunt v. Jucks & London, surviving partners of the company of Jucks & Co.

General reputation is not sufficient to charge a particular person as partner; there must be some confession of his, or some overt act to prove it. When a person indebted to another, knows what sum he is to pay, and when he is to pay it, he must pay interest.

Dunbebbin had purchased the tobacco of the Plaintiff, and had not paid for it. *Dunbebbin* was dead, and his estate supposed difficult to be come at—whereupon the suit was instituted against these Defendants. The proof of the partnership depended upon the deposition of *Mr. Hooper*, who deposed, that about the time of the purchase, there was such a company as that of *Jucks & Co.* that he was a partner himself, and also *Dunbebbin & London*, and another whose name he mentioned; and that to the best of his remembrance, some of the partners of this company purchased a quantity of tobacco of the Plaintiff for the company. A letter was produced written by *London* or *Dunbebbin* to the Plaintiff, stating the account, which was in the name of *Jucks & Co.* It informed the Plaintiff that *Jucks* had the money to pay the balance of the account; and the Counsel for the Plaintiff insisted this tender had been made upon this evidence. The court left it to the jury to say, whether such a company had existed, and whether the Defendants had been partners. The court informed them, that the other depositions in the cause, stating a general reputation of the partnership, were not sufficient to charge *Jucks* as a partner—there must be some confession of his, or some overt act proving the same; but if they could rely upon the accuracy of *Mr. Hooper's* remembrance, as he had spoken of it; or if they believed *Jucks* carried the letter and the money mentioned in it, and knew how the account inclosed was stated, that would amount to an admission of his being a partner; and in that case, they should find for the Plaintiff, otherwise for the Defendant.—They found for the Plaintiff, and also, pursuant to the charge of one of the court, given a few days before, who stated the rule to be, that wherever the debtor knows precisely what he is to pay, and when he is to pay it, that the

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Apr. 1795. jury might give interest by way of damages, if they thought proper. They did in this case allow damages to the amount of the interest on the principal sum, by way of addition to the principal damages, and it was not complained of on the other side, and the Plaintiff had judgment.

NOTE.—*Vide State v. John G. & Thomas Blount, ante 4.*

Smith v. St. Lawrence.

The negotiability of a bill or note may be restrained by indorsement, or by special words, in the body of the note. Indorser may sustain an action in his own name, either striking out the indorsement, or without it; possession of the note being *prima facie* evidence of payment to indorsee.

(175) This was an action instituted upon a note under seal, dated since the year 1786, promising to pay the money to Plaintiff and to him only. It was indorsed by the Plaintiff to an assignee, but the action was still commenced in the name of the original payee. *Mr. Moore*, for the Defendant, objected that the Plaintiff ought not to recover, because it appeared by this indorsement that the property or interest in this note, was not in the Plaintiff but in another person, the indorsee. *Gen. Davie, e contra*—the indorsement of a note by special words, may restrain its future negotiability. 2 *Doug.* 638.—And by parity of reason, the negotiability of a note may be restrained by special words in the body of the note itself—if so, then here is the word *only*, meant no doubt to restrain its transfer, and then it is not negotiable under the act of 1786. c. 1. which only says, that “all bills, bonds or notes for money, as well those with seal as those without seal; those which are not expressed to be payable to order, or for value received, as those which are expressed to be payable to order, or for value received, shall, after the passing of this act, be held and deemed to be negotiable; and all interest and property therein shall be transferable by indorsement, in the same manner, and under the same rules, regulations and restrictions, as notes, called promissory or negotiable notes, have heretofore been.” This clause comprehends the case of notes, in which there is nothing expressed towards rendering them negotiable; but it does not extend to cases like the present, where negotiability is ex-

pressly guarded against ; and of course the indorsement in the present case cannot operate as a legal transfer of the note. One of the Judges mentioned the case of *Dook v. Caswell*, formerly decided in this court, where the note was indorsed to *Benton*, but the suit commenced in the name of *Dook*, and the court allowed the indorsement to be struck out, upon an objection similar to the present being made. Upon the mentioning this case the record was searched and found to be so. Apr. 1795.

Per Curiam—The negotiability of a bill or note may be restrained by indorsement, or by special words in the body of the note itself ; and if it could not, yet the original payee, having the bill or note in his possession, is evidence of the note having been returned to him by the indorsee after the indorsement ; and if a payee indorses by a general or special indorsement, and the assignee cannot obtain payment of the drawer, or maker of the bill or note, he may call upon the indorser, and he is compellable to pay the money and take back the bill or note ; and if in such case the indorser or payee could not sue the maker in his own name because of the indorsement, he could not recover at all. He may strike out the indorsement, or recover without striking it out—his possession of the bill or note being evidence of such a repayment until the contrary be shewn. *Show. 163. Lutw. 885, 888, 896*.—So there was a verdict and judgment for the Plaintiff.

NOTE.—*Vide L. Ray. 743*, where the indorser, who was in possession of the bill, having paid it to the last indorsee, was nonsuited for not producing a receipt for the money paid from the last indorsee—but the Chief-Justice Holt thought proof of the payment would have been sufficient without the receipt. The fact in the cited case was, that *Dook* the payee, had endorsed to *Benton*, who was an attorney, that he might institute the suit in his own name, but to the use of *Dook*—*Benton* gave nothing for the bill, and died before the commencement of the intended action, whereupon the bill was returned by the Executors to *Dook*. (176)

NOTE.—*Vide Drew v. Jacobs's Adm'r. 2 Murph. 138. Dook v. Caswell* and the note thereto, ante 18.

State v. Roberts.

Indictments containing three counts, the first of which the Court had no cognizance of. To submit on the first count (the others not to be considered) would oust the Court of jurisdiction. Submission cannot be made upon one count without all, unless *not pros.* is entered as to the other counts. Upon assaults with intent to kill, the Court may punish by fine only.

He was indicted for an assault and battery, stated in three counts ; in the first, for a common assault and bat-

Apr. 1795. tery; in the second, for an assault with intent to kill and murder; in the third, for an assault and wounding with intent to kill and murder. *Gen. Davie* for the Defendant, upon an agreement between him and the Solicitor-General, offered to submit upon the first count, and the other counts should not be considered at all. *Per curiam*, if he submits upon that only the court cannot take any notice of the offence, being ousted of original jurisdiction by the act of 1790, *ch. 3. sec. 8.* which directs, "that all indictments for assaults, batteries and petit larcenies, shall in future originate in the county courts of pleas and quarter sessions only." These words are equivalent to express negative words, which it is said are necessary to oust this court of jurisdiction, and the Defendant cannot by his admission give to the court cognizance of an offence which by law they have no cognizance of, any more than a prisoner indicted for a capital felony, could by his admission give authority to a county court to pass sentence upon him. Neither can there be a submission for part of the indictment only—he must submit as to all the counts in the indictment if he submits at all, unless the Solicitor-General will enter a *noli prosequi* as to some. *Et per curiam*, this court are not obliged to imprison upon a conviction for an assault with intent to kill—they may inflict imprisonment, the pillory and a fine, but they may inflict some or one of them only. 4 *Bl. Com.* 217, means only that the court have a discretionary power of inflicting the punishments there mentioned, not that they are obliged to inflict all of them. He submitted, and the witnesses for the State were examined, and the court fined him only.

NOTE.—That the consent or admissions of parties cannot give a Court jurisdiction. See *Waggoner v. Grove*, *Conf. Rep.* 516.

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FAYETTEVILLE, APRIL TERM, 1795.

Seekright, on the demise of Wright and Wife, v.
Patrick Bogan.

It is the first patent or grant, and not the first entry, in the land office that gives the best title. In the case of lapped patents where both are in possession of their respective tracts, but neither actually settled on the lapped part, the oldest grantee will be considered as having the legal possession of that part. Plaintiff may prove the loss of his deed by his own oath; but not that the plat offered in support of his title was part of the deed lost.

Ejectment for fifty-four acres of land. The Plaintiffs claimed under one *Thomas*, who conveyed to *Aaron Baker*, who died seised, leaving the feme his only child.—The grant to *Thomas* bore date in the month of December, in the year 1770. The mesne conveyance to *Baker*, his dying seised, and the heirship of the Plaintiff, were proven. The Defendant claimed title under one *M. Natt*, who conveyed to him. *M. Natt's* patent bore date 18th April, 1771, and his conveyance to *Bogan* was proven. The land granted to *Thomas*, and by him to *Baker*, was a large tract of five hundred acres. The tract granted to *M. Natt*, and by him to *Bogan*, was a tract of two hundred acres, and it intersected the tract of five hundred acres, so as to include the fifty-four acres which were the subject of this dispute. *Bogan* took possession of his tract of two hundred acres, as one witness proved, in 1775, as another said, in 1773, and continued that possession down to the present day. *Baker* was proven to be in possession of his tract of five hundred acres in 1778, soon after the Briar-creek defeat; and his possession has also been continued to the present time, except as to these fifty-four acres, which were cleared by *Lanier*, the first husband of the feme, and cultivated for two years; he then died, and the feme intermarrying with *Wright*, he cultivated it one year; in the fall of which year *Bogan* entered and took possession—whereupon this action was instituted. *M. Natt's* entry in the land-office was made in the year 1766, that of *Thomas* at a subsequent period. This being the evidence, *Mr. Moore* for the Plaintiffs, was about to speak to the jury; but Judge *Macay* called to *Mr. Williams* to begin. He insisted that their entry was prior—that *M. Natt* had first purchased, and was in justice entitled to it. Secondly, that *Bogan*

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Apr. 1795. had possession ever since the year 1773, and that more than seven years having elapsed, during all which time *Bogan* was in possession, that the Plaintiff had thereby lost her right of possession.

Per curiam, the question here is who has the best title to possess this fifty-four acres—as to which the rule is, that the first patent or grant gives the best title, not the first entry in the land-office, unless the first patentee or grantee loses that title by suffering an adverse possession of seven years without entry, claim or action made by him within that time. Here the Defendant hath been in possession ever since the year 1773, but the operation of the act of limitations hath been suspended by two several acts of the Legislature, from the year 1773, to the first of June, 1784, that is to say, by the act of 1777, c. 2, sec. 54, and the act of 1783, c. 4, sec. 9; and this action was commenced after the first of June, 1784, and before seven years had elapsed from that period; so that there is no bar formed under that statute by the possession which the defendant had. Besides, the rule of law is, that where two persons are in possession, claiming by different titles, the law will adjudge the legal possession in him who hath the right. In the present case both Plaintiff and Defendant were in possession of the fifty-four acres in dispute, from the year 1778, when *Baker* is proved to have been in the occupation of his five hundred acre tract; and therefore from that period he claiming under the patent first dated, the law will adjudge the possession of this tract of fifty-four acres to have been in him; and then from the year 1773, when *Bogan* first took possession of his two hundred acre tract, to the year 1778, there were but five intervening years—*Bogan's* possession of the fifty-four acres was then defeated by *Baker's* entry into his five hundred acre tract—for either of these reasons, possession will not avail the Defendant in the present case, and then the title must rest upon the priority of the patents. Wherefore the Plaintiffs ought to recover, and there was a verdict and judgment for the Plaintiffs accordingly.

NOTE.—Upon this trial *Williams* for the Defendant, offered in evidence a plat and certificate of the survey made for *McNatt*, alleging it had been annexed to the original patent, which was destroyed, and this the only part of it that had been preserved. He proved the destruction of the patent by *Bogan's* affidavit and offered to prove this to be the plat formerly annexed to it by the same means: but *per curiam*, though the party offering the copy of a deed, has been permit-

ted to prove the loss and destruction of the deed by his own oath, Apr. 1795. he has never been permitted to prove a part of his title—this would be to allow him to prove by his own oath, that the paper in question was an appendage of the old deed; when perhaps it might not have been so, and by that means he would be let in to prove by his own oath, a material part of the title perhaps that he set up, at least a very material fact in this controversy. This would be going much further than the bare letting him into the exhibition of a copy of the deed; which when produced, must be proven by the certificate of an officer acting on oath, or the oath of a person who had compared it, to contain the words of the original paper which once existed.— And the court refused the evidence offered; saying further, that there is a counterpart of all the old patents and plats lodged in the Secretary's office, and that might have been produced by force of a *duces tecum*, and would have been more satisfactory evidence than the paper now offered.

Upon the first and last points see *Dickey v. Woodenpile* post 358, and *Blanton v. Miller*, ante 4. The decision upon the point of the lapped patents has been confirmed in several cases which hold further that if "one of the parties is actually settled for seven years together upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby". *Bryant v. Allen & others*, 2 Hay. 74. *Barrels v. Turner*, *ibid.* 113. *Slate v. Griffin*, *ibid.* 178. *Sawyer v.*—*ibid.* 235. *Orbison v. Morrison*, 1 Hawks, 467.

Den on the demise of Park, v. Cochran and others.

A party who has been guilty of neglect, may, upon seeking a continuance, be compelled to pay the costs of the term, as the condition of the continuance; and these costs are not to be refunded even though he should succeed in the cause. In this country, no actual entry is necessary until an adverse possession commences. A possession to bar an entry must be a continued one.

Ejectment. The continuance of this cause was moved for upon an affidavit, stating that the Plaintiff had at the last term procured an order of survey of the premises in dispute; that he had given notice that he would begin the survey four days before the beginning of this term; that it had been begun accordingly, and that the survey was not yet completed, though it would be completed by the end of this day, the day on which the motion is made. It appeared on the other hand that this order had been first procured about three years ago, and had been renewed from term to term ever since, and that the survey had never yet been completed. *Per curiam*, the Plaintiff has been guilty of great neglect; he might have procured a survey before this time. This is distinguishable from the case of *St. Lawrence* last term, at Hillsborough, to which it has been compared—*St. Lawrence* had made no preparations at all for the trial, for want of notice as he

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Apr. 1795.  said, of a new trial having been granted the term before ; whereas he might have known it, had he made the proper enquiry, as he ought to have done—the motion for a new trial being his own motion. Here the Plaintiff began his survey in time, as he supposed, to complete it by the time of the setting of this court at the present term ; but hath been prevented by some unforeseen difficulties, and will be ready with his plats after this day—his cause therefore should be continued ; but as he has not used all the diligence that he might have used to prepare for the trial, therefore according to the act of 1779, c. 4, s. 5, he must pay all the costs accrued at this term ; which are not to be refunded to him even although he should eventually prevail. Rather than submit to these conditions, the Plaintiff thought proper to proceed to trial ; and upon the trial, it appeared that *Dyer* and *Carroll* had been the proprietors of the land out of which this lot was taken ; that they conveyed to the Plaintiff's father, by deed dated the ninth of May, 1763. Its execution by *Carroll* only had been proven, and it had been registered upon that proof ; and the Plaintiff was proved to be the heir at law of the bargainee. On the other side it appeared, that on the 22d of November 1764, *Dyer* and *Carroll* and others, assignees of the estate of the first mentioned *Carroll*, conveyed part of this large tract of land to *Edmond Fanning*, and on the same day *Dyer* and wife conveyed another part thereof to the said *Edmond Fanning* ; and it seemed to be admitted that the lot conveyed to *Park*, or described in his deed, lay somewhere within the lot conveyed to *Fanning*. The 3d of May, 1775, *Fanning* conveyed to *Cochran*, father of the Defendants, who is now deceased. *Fanning* between the commencement of the year 1764, and the year 1766, built a house upon the lot now claimed, and was sometime in erecting buildings which when built had fallen down ; after which time he had no actual possession—he had no actual possession to the time of his conveyance to *Cochran*. *Cochran* took possession in 1775, and that possession has been continued to the present time. *Parks* had never any actual possession. This being the evidence, *Mr. Williams* for the Defendant, moved that the Plaintiff might be called. He cited many authorities from the English books to prove that unless a man has entered within the time limited by law, he can never enter after-

wards, but loses his right of entry. That here was an adverse possession in *Fanning* between the years 1764 and 1766, and the possession once being adverse need not be continued. That *Cochran's* possession commenced in 1775, and was an actual adverse possession. But *per curiam*, though the law as stated by *Mr. Williams*, is so in England, yet it is different in this country—in this country there is no necessity for an entry, until an actual adverse possession commences, and that actual adverse possession must be continued for seven years, without entry or claim on the other side, before it can toll the Plaintiff's right of entry. The contrary doctrine in this country would be attended with consequences very fatal to titles for land. According to *Mr. Williams' position*, if a man had title to a tract of land which he had not been upon for seven years, Defendant next day after the seven years expired, might enter without any colour of title, and hold it forever against the first lawful proprietor. *Fanning's* possession was not continued longer than the house was building. The next adverse possession of *Mr. Cochran*, commenced in 1775; from that time to the first of June 1784, the operation of the act of limitations is suspended; and in 1784, before the act began to run, the Plaintiff's father died, leaving the Plaintiff an infant, and he continued an infant till just before the commencement of this action, so that the Plaintiff ought not to be nonsuited; but afterwards at another stage of this trial, a juror was withdrawn for another reason.

NOTE.—As to the continuance see *Tyce v. Ledford*, ante 26. Upon the other questions see the note to *Strudwick v. Shaw*, ante 5.

The surviving Partners of Auley M'Naughton and Co.
v. John Naylor.

Debt, and payment pleaded; and the jury being called *Mr. Spillar* would have pleaded a plea *puis darrein continuance*; but *per curiam*, the court must be satisfied of the probable truth of the plea, before they will permit it to be made; and cited *Buller* 309. 2 *Mo.* 307. *Feltv.* 181. *Cro. Eliz.* 49. And *Mr. Spillar* not being able to satisfy the court on these heads, he was not permitted to enter his plea. See 2 *Wils.* 137, 138, where it is decided

Apr. 1795: that the court cannot reject a plea *puis darrein continuance*, if verified by affidavit; also 1 Str. 492. 3 Term, (181) 554.

NOTE.—*Vide also Chitty's Pleadings, Vol. 1, p. 638.*

Peale v. Folsome.

At the pleading term, the Defendant pleaded *non est factum*, and conditions performed; and afterwards at another term, the insolvent debtor's act. Mr. Hay insisted, that was intended as a plea *puis darrein continuance*, and that it was a waiver of the preceding pleas. It was insisted on the other side, that it was not a plea *puis darrein continuance*, not having been so pleaded, nor entered on the record as such. *Per curiam*, were it a plea *puis darrein continuance*, the plea of *non est factum* would be thereby waived, and you would have no need to prove the execution of the bond; but unless the other side will concede it to be a plea *puis darrein continuance*, the court cannot take it to be so. It does not purport in itself, nor by the entry of it on the record, to be a plea of some new matter arisen since the last continuance. It might have been, and probably was a plea added to the others by motion to the court, or by consent of the opposite party, as an original plea—a juror was withdrawn by consent.

NOTE.—*Vide Greer v. Sheppard, ante 96.*

M. Murphey v. Campbell.

Process returned by the Deputy Sheriff, should be in the name of the High Sheriff, and not in the name of the Deputy, for the High Sheriff; but a return in the latter mode was supported.

Vide Car. Law Rep. vol. 2, 440. Campbell had been summoned on the part of M. Murphey to attend this court as a witness in his behalf; and when the trial came on, failing to appear, was called upon his *subpœna*, and his default recorded; whereupon a *sci. fa.* issued against him, and now his defence was, that he never was summoned by any proper officer. The *subpœna* when produced, appeared to have been served by the Deputy Sheriff, and returned by him in his own name for the High Sheriff, and not in the name of the High Sheriff, as it should have been—whereupon Mr. Spillar objected that the Deputy Sheriff was not a sworn officer, which was conceded in the present case, and that

therefore as the return was made by him, and not in the name of the principal, it was not a good service. *Per curiam*, the return here is for the principal by the Deputy, which is nearly the same thing as if the return had been "executed," and the name of the principal subscribed, and the words "by A. B. Deputy Sheriff" added, which is the usual course. This return is indeed a little irregular, but it cannot now be amended, the principal being dead, and the Deputy removed out of the State. Such returns however, though irregular, have prevailed very generally through the country for a long time, and the disallowing them, would be productive of terrible inconvenience. *Communis error facit jus*, is a maxim we do not approve of, but it must sometimes be submitted to for the sake of avoiding confusion. The course of practice frequently makes the law, and must be given way to where a sudden disallowance of it would be followed by a great public evil. In strictness however, there is no doubt, but that all returns should be made in the name of the High Sheriff. *Salk.* 96. *Bac. Abr.* 437. 1777, c. 8, s. 5. So the objection was overruled, and the Plaintiff had judgment. (182)

Vide State v. Johnston, post 293. *Holding v. Holding*, 2 Car. Law Rep. 440,

Duncan M'Rae v. the Administrators of J Moore.

When "no assets" are plead, the Plaintiff shall have judgment for the amount of the assets which he can show in the hands of the Administrator, and judgment *quando* for the balance of his debt.

Set off and no assets pleaded. The debt was one hundred and fifty-four pounds two shillings, and Plaintiff produced the inventory, shewing assets to the value of one hundred and twenty-four pounds eighteen shillings and six pence; and the jury gave their verdict accordingly—whereupon the Plaintiff had judgment for one hundred and twenty-four pounds eighteen shillings and six-pence, to be levied of the goods of the deceased, in the hands of the administrators; and for the residue he had judgment to be levied of the assets which should thereafter come to the hands of the administrators to be administered.

Vide 8 Rep. 134. *Swinb.* 392. *Leon.* fol 67. 1 And. 150. *The Office of Executors*, p. 191, says Plaintiff shall have judgment for as much as Defendant hath assets to

Apr. 1795. pay, and an award that *quando assets acciderint in futuro*, that then he shall have judgment for the residue, upon which award a *sci. fa.* lies to have judgment and execution. *Co. Ent.* 151. b.

NOTE --Vide 1 *Saund.* 336, note 10, for the form of the judgment in such case. See also *Gregory v. Hooker's admr.* 1 *Dev.* 442.

Jamieson, assignee, v. Farr.

A bond payable partly in money and partly in specific articles is not negotiable under the act of 1786, *Rev.c.*248.

(183) Debt upon bond for fifty pounds, dischargeable part in money, and part in specific articles. After verdict it was moved in arrest of judgment, that this bond is not assignable so as to enable the assignee to bring debt in his own name; and it was argued that no bonds are negotiable unless for money absolutely, not where they are for money and something else beside, or for money, but to be discharged in something else. In support of this doctrine, were cited *Kidd on Bills* 32, where it is laid down, that the instrument must be for money in specie, not to be paid in good East-India bonds, or any thing else but money; also, 3 *Wils.* 213. *Bull.* 273. 2 *Str.* 1271. *Per curiam*, the act of 1786, c. 4, makes only bonds for money negotiable. Bonds for specific articles could never answer the purposes of trade, not being the representatives of any certain value as money is. The assignee of such bonds could never know how much money to expect in lieu thereof, neither could he know whether the debtor would discharge the bond in the stipulated article or in money. But bonds for money are of a certain precise value, the payment must be in money—the assignee knows exactly how much he is to receive, and when upon a man of good credit, may be readily substituted, for the same sum in money, or almost with the same advantage as if it were money, without any danger of being afterwards involved in disputes about the value—which in the case of bonds for specific articles is continually fluctuating, and depends upon a great variety of circumstances. For these reasons the law has never made bonds for specific articles negotiable, but only bills, notes and bonds for money. The cases in 3 *Wils.* 213, and in *Kidd* 32, are precisely similar to the present, and the reasons for these decisions are strictly applica-

ble to the case now before us. On the score of reason, ^{Apr. 1792} the present case cannot be distinguished from them, therefore the judgment must be arrested—and it was arrested accordingly.

NOTE.—*Vide Tindall's exrs. v. Johnston*, post 372. *Campbell v. Mumford*, post 398. *Thompson v. Gayland*, 2 Hay 150. *Wofford v. Greenlee*, Conf. Rep. 79. The law is the same of bonds payable on a contingency. *Goodloe v. Taylor*, 3 Hawks, 458.

Anonymous.

Payments made in the depreciated currency prior to 1783, shall discharge the same numerical sum, as their nominal value.

This was an action of debt upon a bond, dated the 21st March, 1776, payable in September, 1776, for 2200 pounds, and payment pleaded. There was also another bond for seven hundred and thirteen pounds, upon which a suit had been instituted in the county court, and payment pleaded to that; and the same payments were there proven, as were now proven to this bond. But it was alleged that these payments were large enough to discharge both bonds, and the Defendant's counsel offered that the amount of the principal and interest of the small bond, might be deducted from the payments now about to be proven, and the balance of the payments only to be applied to the discharge of the present bond. To this the court assented—and he proved one hundred and ten pounds sixteen shillings and eight pence, paid the 19th day of January, 1777; nine hundred pounds, the 17th day of November, 1779; one thousand two hundred and thirty-seven pounds ten shillings, the 22d day of January, 1780; and ten thousand pounds the 26th of May, 1780. All of these sums but the first, were in depreciated money, and if reduced into money of the present currency, by application of the scale at the several times of payment, would amount to about the sum of three hundred and forty-nine pounds four shillings and ten pence. But if taken as payments according to the nominal value when paid, both bonds were discharged. The counsel for the Plaintiff contended, that the payments ought to be scaled, and that this had been the practice of the courts heretofore in divers instances—that to allow them as payments according to the nominal amount, would be injustice to the Plaintiff, as his bonds would then be discharged by one tenth of their value; and he urged that the

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Apr. 1795. payments made being much beyond the sums contained in the bonds, afforded an evidence, that the Defendant believed himself bound to pay as much of the depreciated money as was equivalent in real value to the sums mentioned in the bonds. He argued further, that the Legislature intended payments made in the time of the war, to be reduced by the scale to their real value; for 1783, c. 4, s. 11, repeals the tender laws, so far as they related to the payment of debt; and by sec. 7th, have ousted all pleas of tender with an always ready, alleged to be made in the time of the war, unless such pleas be accompanied with affidavits stating that the sum tendered, was equal at the time of the tender, to the debt or damage demanded, according to the then depreciation; and as no tender of the nominal debt made in times of depreciation is good, as by this act it clearly is not, by the same reason no payment made in depreciated money, ought to pass to the credit of a bond for more than its real value.

Per curiam, it hath been the constant practice ever since the passing of this act, that payments made in the time of depreciation, should discharge as much of the debt as such payments nominally amounted to. A contrary decision at this time, would revive many of the old disputes that have been settled by that rule, and produce much litigation. When payments were made in depreciated money in the time of the war, they were generally understood to be equal to the same nominal sum in the bond—both sums were equally depreciated—both the money in the bond and money paid. Had the creditor sued for his debt he could have recovered no more than as much depreciated money as numerically equalled his debt. When he received depreciated money for his debt pound for pound, or shilling for shilling, he received precisely what the law allowed him, and what it would have compelled the debtor to pay. Under the laws then existing, the debtor was discharged *pro tanto*, according to the numerical sum; and the act of 1783 did not intend to lay any new charge upon the debtor to which he was not subject before, or from which he had been discharged under the operation of the tender laws, and payments made before that time—nor is it clear the Legislature could have thus subjected him, had they been so inclined. The act of 1783, meant only to repeal the tender laws, so that they should not operate for the future.

not to destroy the effect and operation of the laws upon transactions that had already taken place under them.—
 It must be admitted that a payment made in the time of the war of the whole numerical sum due upon a bond, is a legal discharge of that bond, although the real value of the payment was much inferior to the real value of the money mentioned in the bond at the time of the contract: for no instance ever occurred since the war, where such payment has been reduced by the scale—and if the law be so in case of full payments, so it is also in case of partial ones. The case now before us is that of a full payment. Indeed, it is not founded in justice, that the creditor shall receive the full value of his money, and be exempted entirely from all loss by depreciation, when the debtor, who perhaps procured the money, or securities for money, at an early period, when the currency was but little, if at all depreciated, intending therewith to pay off his debt, shall be allowed only the real value, when he received from his debtor and paid it to his creditor, and very likely did this at the request of his creditor.—Depreciation was a consequence of the war carried on, as well for the benefit of the creditor as the debtor, and he ought at least to bear a part of this burthen. As to the argument drawn from the 7th sec. of the act of 1783, that act stopped the circulation of the depreciated paper currency, and had it not made some provision for the cases of tenders made in the time of depreciation, the Plaintiff wherever a legal tender had been made, would by the operation of this act, have been barred forever.—The Defendant might have pleaded the tender with an always ready, and have paid the money that had been tendered into court, leaving the Plaintiff no other alternative, but to take that or join issue; in which latter case, if the plea proved to be true, he was barred. This would have been a case of hardship, especially where the money had been refused because of its great inadequacy in point of value to the contract—his hardship was prevented by the clause in question. It says nothing of payments actually made—it only provides against a total loss of the debt where the Plaintiff has not received the money, and only extends to cases after a certain day when the money had become greatly depreciated, not to cases before. It only places the debtor, who had made an unconscionable tender, in the same situation with one who had made no tender at all. But this is a very differ-

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Apr. 1795. ent thing, from a payment actually made and accepted, and understood at the time to be a discharge. But if the reason of the thing be not in opposition to the doctrine contended for on the part of the Plaintiff, the constant practice of our courts hath been; and we ought not to render the law uncertain by a contrary decision.— The Plaintiff suffered a nonsuit.

Lucy Lee v. William Ashley.

Trespass, *quare clausum fregit*; not guilty, and *liberum tenementum* pleaded. It appeared in evidence, that the land on which the trespass is alleged to have been committed, was a tract of two hundred and thirty acres, which was part of a tract of fifteen hundred acres, of which *Zachariah Lee*, the husband of the Plaintiff, died seised; who at the time of his death, left a son and heir at law, now of the age of thirty-one years. This son had sold all the land except the two hundred and thirty acres, some considerable time ago; then he sold the residue to *John Field*, who sold to the present Defendant. The Plaintiff had kept possession from the death of her husband until the conveyance to *Field* of the residue, which lately took place. She verbally assented to this latter conveyance. *Field* and the son on their parts agreeing that she should possess one hundred acres during her life. Upon these facts the counsel for the Defendant, insisted that the plea of *liberum tenementum* was supported. He argued, that though it be sometimes laid down in the books, that possession is of itself sufficient to support an action of trespass, *quare clausum fregit*, and that the action of trespass is an action for the violation of possession, the true distinction is, that possession only is sufficient to support the action against a mere trespasser, who hath no cause of justification or excuse, or in other words, against a wrong doer. 2 *Str.* 1238. *Bull.* 98. But where the Defendant hath the freehold, and pleads it, there a bare possession is not sufficient; for then the entry of the Defendant is lawful, and not a trespass. In such case the Plaintiff can no otherwise support the action, than by shewing an interest in the soil or the profits, either derived under the Defendant, or precedent to his title, as will take away the Defendant's right to enter for the present. Some of these in-

stances are stated in *Bull.* 85, in the case of *Welch and Hall* there cited; and others in 3 *Bl. Com.* 210. *Bull.* 93, 94. Here indeed, the Plaintiff hath continued the possession from the time of her husband's death, but upon his death the fee and freehold descended to the son, who it is proven lived upon the land with his mother, and consequently had the legal possession; and he hath conveyed both the fee and freehold to the Defendant: his entry was therefore regular, unless it can be shewn, notwithstanding the Defendant's having the freehold, that she hath a right to maintain her possession against him. She hath not replied her having any such interest by way of avoiding the plea of *liberum tenementum*; indeed the fact is, she hath no such interest to reply. It hath been argued for her, that upon the death of her husband she had a right to continue the possession, notwithstanding the heir's title until her dower should be assigned; and for this her counsel cited 2 *Bl. Com.* 135. Allowing the fullest extent to this doctrine, she could continue but forty days in possession, and after the expiration of that time, if her dower had not been assigned in the *interim*, she was liable to be turned out of possession by the heir, and could have no other action but that of dower to recover the possession of any part; though before the expiration of the forty days, the old law provided her with a writ *de quarantina habenda*, to be decided *instantly* by the Sheriff. *Co. Litt.* 34, b. 2 *Inst.* 16, but no such writ lying after the forty days, is a proof that she was no longer entitled to possession though her dower were not assigned. Had the law intended that her possession should continue until the actual assignment of dower, it would have provided a remedy in case of dispossession previous thereto.

As to the doubt suggested by one of the court, relative to the estate in dower being considered as a part of the estate of the deceased still continuing, so that the law does not cast the freehold thereof, but only the reversion upon the heir; for which were cited the authorities of *Co. Litt.* 241, a 15, a 31, a and b 327. 44, 45. (see also *Gilbert's Ten.* 23, *Hawk. Abr.* 23). The best answer to that is, 2 *Bl. Com.* 135, 136, where it is said, the assignment of dower must be made by the heir or his guardian, to entitle the lord of the fee to demand his services of the heir, who by his entry to assign dower, becomes

Apr. 1795. *tenant of the land to the lord, and the widow immediate*
 (188) *tenant to him. Whence it follows, that the heir has the*
right of entry and freehold, which the law casts upon
him from the moment of the ancestor's death, and not a
reversion only.

Per curiam ; we entertain some doubt upon the facts stated in evidence relative to this plea of *liberum tenementum*—let the jury give their verdict as they shall think proper ; and if either party be dissatisfied, he may move for a new trial, and then the law will be more deliberately considered.

The jury found for the Defendant, and the cause was no more stirred.

NOTE.—When the plea of *liberum tenementum* is pleaded, which is called the common bar in the action of trespass, if the Defendant has not given a name to, or described exactly, the *locus in quo*, in his declaration, it becomes necessary for him to make a novel assignment, to which the Defendant again pleads ; but if the Plaintiff describes the *locus in quo* in his declaration, with precision, then the plea of *liberum tenementum* puts it upon the Defendant to prove that the *locus in quo* thus described, is his freehold ; and the Plaintiff need only deny the plea, without a novel assignment. And in the first case, if the Plaintiff does not make a new assignment, ascertaining the place, the Defendant may prove any close that is the freehold, and that will support his plea. But the freehold, I apprehend, must be proved to be within the place laid for the venue. *Vide 2 Bl. Rep. 1089. Salk. 453. 6 Mo. 119*, but if the action of trespass be, *de bonis asportatis*, and the Defendant pleaded that the *locus in quo* is his freehold, and that the goods were then damage feasant, then he must describe the place with certainty—the locality is a material part of his plea—and without it the plea is not good. So if to trespass, the Defendant pleaded *son assault*, proof of an assault by the Plaintiff on the same day, or before the action brought, supports the plea. So that if in fact there were two batteries, one produced by the Plaintiff's own assault, the other not, the Plaintiff must new assign and distinguish the battery not brought on by his own assault—but if there are two counts stating the two batteries, and two justifications or pleas of *son assault*, one of them will be untrue, and upon that the Plaintiff may recover without a new assignment. *Buller 92.*

NOTE.—It appears evident from the authorities cited on that head above that the wife is deemed to continue the estate and possession of the husband after his death ; the reason of which probably may be, that if she claimed under the heir and not paramount, her dower as being a part of his estate, might be subject to his prior charges and incumbrances, which is avoided by her claiming above him. Also if she claimed under the heir and from him, and was not in, in continuance of her husband's estate—then if the husband was tenant in tail, and he died without issue, in that case there would be no heir nor any estate tail, and she would lose her dower. Yet by law she is dowable, and of necessity the estate tail of the husband must have continuance as to one third until her death. *Vide 8 Rep. 34. 6 Rep. 41. 2 Bac. Ab. 127.* Again, were the dower a part of the heir's es-

tate, then by the descent he might be remitted to his ancient and better title, and the estate descended thereby, cease altogether, and the widow be defeated of dower. This the law does not allow. Her dower therefore is not derived out of the heir's estate, nor supported by it, but out of the estate of the husband, continued by fiction of law after his death; which fiction is invented for the purpose of avoiding the inconveniences above stated, and others that might result were it not for this fiction. Apr. 1795.
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**The surviving Partners of Auley M'Naughton and Co.
v. John Moore.**

Per HAYWOOD, Judge.—Death of one partner dissolves the partnership, and a clerk or agent, who had been appointed by the company, cannot, after such dissolution, do any act to affect the interest of the company, as to receive payments &c. But the jury found otherwise.

This was an action of debt, and payment pleaded; after the death of *M'Naughton*, *M'Auslin* received forty pounds, and indorsed it on the bond; and the question was, if this was a good payment. It appeared in evidence, that *M'Naughton* and *M'Auslin*, both lived in the same town before the death of the former. That *M'Naughton* appointed the other one of his clerks, that he opened a store, and put up a sign, purporting that the store was *M'Auslin's*, but the books were kept in the name of the company; that this bond was for a debt contracted in that store, and was made payable to *M'Naughton & Co.* *M'Naughton* wrote to his correspondents in Europe, informing them that he had appointed *M'Auslin* one of his clerks, or agents, or assistants; of which they approved by their letters in answer; and about twelve months before the death of *M'Naughton*, they addressed letters to *M'Auslin*, as an agent of the Company. It was argued that this payment was not a legal one, and 2 *Esp.* and 1 *Salk.* 27, were cited.

Judge MACAY being some way interested in the question, gave no opinion.

Judge HAYWOOD doubted, and requested that if the jury should give a verdict pursuant to the opinion he was now about to deliver, and the bar should be at all dissatisfied with it, that they would by motion for a new trial, or by some other means, put the question upon record, in order to a further investigation—his opinion being very unsettled, as the question came suddenly upon him without any previous intimation of it, and before he had time

Apr. 1794 to form it upon deliberation and looking into authorities. Then turning to the jury, he said, with respect to the point under consideration, it seemed to him, that where there were several partners in trade, and one of them died, that operated a dissolution of the partnership. As they could no longer trade jointly together, and the interest of the deceased vested in executors, the goods and debts immediately became vested in the survivors; and a right to a share of what remained after all debts due from the company were paid and satisfied, belonged to the executors of the deceased. That *M. Austin* was to be considered as a person having authority to act by virtue of the appointment of the company; and as it was a rule that a power to act, could be exercised no longer than the life of him that gave it—the company that gave the appointment being dissolved, and no longer existing, all authorities derived from that company were at an end—consequently, that the authority of *M. Austin* had ceased from the time of *M. Naughton's* death, and he had no power to make sale of goods, or to receive and give discharges for debts afterwards, unless by virtue of a new appointment from the survivors. In which case he would act in the name of the survivors, and not as he had formerly done, in the name of the company. If an authority be committed to several persons jointly, and one dies the authority cannot be executed; and by like reason, if several persons jointly give an authority, and one dies, the authority must be revoked, and more especially where the death of one causes an alteration of the property, concerning which the authority was given—as where by death of one, his share goes to executors or heirs, and the like, who might be unwilling to be bound by the conduct of the agent formerly appointed; and therefore he thought the payment was not a good one. The jury however found for the Defendant.

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NOTE.—A factor is thus described by *Molloy*, 465. He is a servant created by a merchant's letters, and takes a kind of provision called factorage: he is bound to answer the loss which happens by exceeding his commission, but a simple servant or apprentice can only incur his master's displeasure. Extensive commerce renders it necessary for merchants to intrust the sale of their goods, particularly in foreign countries, or remote parts of the same country, to others who do not act under their immediate inspection; and from thence some rules have resulted, which make the case of a factor very different from that of a simple servant or clerk. The factor receives his directions by way of a commission, and is bound like all other

persons authorized to act, by the terms of his commission, or to answer the loss himself, for being at a distance, if he was not thus responsible, the merchant who intrusts him might be greatly prejudiced. If he was empowered to sell simply, he cannot sell upon credit. 1 *Nels. Ab.* 323. pl. 2. If empowered to sell upon credit at the risk of the owner, the debts will be a loss to the owner; but if he is to sell upon credit at his own risk, the loss occasioned by bad debts falls upon himself. 2 *Str.* 1182. When he sells at his own risk, the action against the purchaser is maintainable in his own name. *Buller* 130. When he acts in his own name beyond sea, being authorized so to do by his commission, he may maintain a suit in his own name, and receive payments, because he is the visible owner. *Buller* 130, 136. But if he is not authorized to sell in his own name, but sells and keeps his books in the name of the principal, there I apprehend all payments must be made and received in the name of the principal, and all actions also. Thus there is a decided difference between the case of the factor who sells in the name of the principal, and of him who sells according to his commission in his own name. In the one case the action must be commenced in the name of the principal, and his debt may be set off against it, when that of the factor's cannot; and although in both cases the property of the debts remain in the principal, unless perhaps when the factor sells not only in his own name, but at his own risk also; and upon notice given to the debtor not to pay the factor, it will invalidate such payment as is afterwards made, should it eventually appear that at the time of payment there was no balance due to the factor from the principal. The law gives to the factor for the benefit of trade, a lien for the balance due him for all his transactions, as well for his former services as those upon the goods then on hand or last consigned to him; and not only upon the goods themselves, but upon the price of them also when sold, and whilst it remains in the hands of the purchaser. *Cowp.* 256. And of course he must have a right to receive until he has received to the amount of the balance due to him. And in case of a dispute between the principal and factor, payments to the one or to the other may be made to be at the peril of the debtor, until it shall be settled by agreement between them, or by a judicial decision. It being a rule of law, that no man shall have it in his power to vary the rights of third persons, or to prejudice them by any act of his. *H. Bl. Rep.* 84. *Cowp.* 255. This right of the factor to receive, however, is by virtue of his lien, which the law gives for the security of his balance, not by virtue of any property he has in the goods or debts. 2 *Atk.* 638. But yet when the goods are sold by the factor in his own name, the purchaser cannot set off a debt due from the principal; for as the principal cannot by any act of his defeat the lien, so neither can he by contracting debts with the purchasers of the goods. *Cowp.* 256. There can be little doubt therefore, that a factor having once gained the possession of the goods of his principal, may retain them till his balance be paid; or having sold them, may receive the debts until payment of that balance, unless the purchaser be restrained by notice from the principal from paying the factor, and even then the factor may receive them, if upon the dispute between the principal and him being adjusted, a balance appears in his favour. Could *McAuslin* be considered in the present case as a factor entrusted with the possession of the goods to be sold for the benefit of the company, and there was a balance due to him for the expenditures and services, his receipts might be good until notice to the debtors not to pay him, and such receipts might be binding upon the surviving partners; for

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Apr. 1795. they recognized him by their answer to *M'Naughton*, & by addressing letters to him as their agent; and though a power to sue might possibly be countermanded by the death of *M'Naughton*, yet not his power to receive, that being derived from another source, the lien he had on the price of the goods in the hands of the debtor; but this conclusion can only go upon the supposition of his having been the company's factor, and will only result when that point, and the other of his being entitled to a balance, shall be established. It does not appear he was ever designed by the company to act for them in that capacity; he had no commission or authority from them to that effect; he lived under the immediate and daily inspection of *M'Naughton*; his books were kept in the name of the company. This bond is made payable to them; had any debt been due from the company to the obligor, that might have been set off against this bond; neither is it pretended that there is a balance due to *M'Aulin* from the company; he seems in short to have been nothing more than a simple servant or clerk, who in case of a loss happening to the master, could not have been made liable to it himself; for not pursuing his commission, he was a person from whom *M'Naughton* might at any time have legally taken possession of the goods, as being only a clerk appointed to assist him in his business. He had not in the lifetime of *M'Naughton* any legal possession of the goods, exclusive of and distinct from him; he had no power to sell but by and under his immediate direction and as his instrument; and that power was every moment liable to be discontinued whenever *M'Naughton* should be disposed to discontinue it; the approbation given by the partners in Europe to his appointment, might be founded partly upon the consideration that he was removeable at pleasure, and was under the immediate control of their partner. If such a servant, who for mismanagement and bringing a loss upon his employer, can only incur his displeasure, should still continue the partnership dealing here after the death of the appointing partner, it might be productive of extremely ill consequences. A factor is generally a man of some property, or security is taken from him; he is to account, and for mismanagement his fortune, or that of his securities, is responsible. The clerk being not entrusted so far, is not called upon for any security; he is taken into employment and continued in it upon his good behaviour, and is under the continual control and inspection of his master—that is all the security the employer has in general. Should such an one after the death of the employer be permitted to sell his goods, or collect his debts, he might never be able to make satisfaction to the survivors. If there is no authority expressly in point, that decides a power delegated to one by several, to be revoked by the death of one, it is deducible from the nature of this kind of business, and the evil consequences to trade that would ensue, the doctrine of allowing a servant or clerk to go on receiving the monies of the partnership after the death of the partner, that the law cannot be as contended for in support of this payment. It is argued to be a hardship upon the Defendant if this payment was not allowed to be good. But there is none—the bond is in the name of *M'Naughton & Co.* The death of the partner here was notorious. It is a thing in itself capable of notoriety, and if a man will pay to the clerk after the death of the merchant, he acts in his own wrong. It is no more than the common case of debtors paying into the wrong hand—in which case he is always compellable to pay over again to the right one. This must be clear, that whatever authority was derived from the deceased, so far as concerned his interest, was countermanded by

his death. The clerk appointed by him cannot receive his share of the debts, so as to make himself chargeable for that share to the executors. Their demand will be against the survivors, and it is unreasonable that the agent cannot affect the estate of the person who appointed him, but at the same time shall affect that of the partners in another part of the world at too great a distance to give any check to his conduct; and after all when perhaps he has greatly injured them by mismanagement, that he may be permitted to shelter himself by saying he acted as their servant, and is not liable to make them any satisfaction. A sum received by a surviving partner after the death of the other, is received in *proprio jure*, and not as a partner—because the partnership is dissolved by death. *Law Part. 156, 294. 2 Term. 476.* And it seems to follow, that all authority to dispose of goods and receive payments, cease with its dissolution. The survivors, and they only, become answerable to the executors of the deceased; and if they sell the goods at an undervalue, or otherwise waste the partnership in a losing speculation or otherwise, no loss can accrue from thence to the executors or to the estate of the deceased.

If this decision however be allowed to ascertain what the law is, as the decision of a jury seems to have done in a similar case, 2 *Str.* 1182, then the law now is, that where there are several partners, some here and some in England, and the partner here appoints an agent to assist him in selling goods and receiving debts, and then dies, the agent may continue until notice to the contrary be given to the debtors, to receive debts and give legal discharges; and the death of the partner here is not a countermand of his authority.

NOTE.—In addition to the cases cited by the reporter to show the effect of a dissolution of a partnership by the death of one partner, see *Strange & others v. Lee*, 3 *East. Rep.* 484. See also *Dance & others v. Girdler & others* 4 *Bos. & Pul. Rep.* 34. *Metcalf & others v. Bruin*, 12 *East. Rep.* 400. *S. C.* 2 *Camp. N. P. Rep.* 422.

Winslow v. Walker.

A boat is drifted away from a landing, and taken up by a stranger, who sells to Defendant: *held*, that the stranger's right to salvage, is a demand upon the Plaintiff to be enforced by detention, and that the right is not transferable to a purchaser of the property.

Trover for a boat; and a general verdict for the Plaintiff, subject to the opinion of the court upon this special case, *viz*: The boat sued for, was the property of the Plaintiff, and was drifted away from the landing at Campbellton, and floated down the river 114 miles, to a part of the river about a mile wide, and was there taken up by a stranger; and again got adrift and went to the New-Inlet, where the river empties into the sea, ten miles wide; there it was again taken up by a stranger who knew not the owner, nor from whence the boat had come. The boat was greatly wrecked and damaged, and in that condition was sold to the Defendant, who repaired it: upon which the Plaintiff demanded, and the

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Apr. 1795. Defendant refused to deliver. If on the above facts, the law is for the Plaintiff, the judgment to be given for him in the verdict; if for the Defendant, then a nonsuit to be entered.

And now upon argument it was insisted for the Defendant, that the taker-up of the boat who sold to him, had a lien on it for his salvage, to which he was entitled.— 1 *L. Ray*. 393, the case of *Harford and Jones*, and 2 *Bl. Rep.* 1117, were cited.

The court took time to advise, and the next day gave judgment for the Plaintiff, being of opinion that the right he had to detain the boat until paid for salvage, was in the nature of a demand upon the Plaintiff, or a chose in action, to be enforced by keeping possession of the boat till the Plaintiff should satisfy him, which could not be transferred with the boat to another; and being founded on the possession, when he parted with that, he lost his lien, and could then only recover his salvage in his own name against the Plaintiff. 1 *Atk.* 234, 235. 1 *Burr.* 494. 5 *Bac. Ab.* 270. *Doug.* 105. 4 *Burr.* 2214. And there was judgment for the Plaintiff.

John Ingram, Assignee, &c. v. John Hall.

A bond for payment of money without a subscribing witness, can only be declared upon as a sealed instrument; and proof of the obligor's hand-writing will be admitted as proof of the seal: but proof of the seal is not evidence of delivery, which is to be inferred from other circumstances.

Debt, and *non est factum* pleaded. The jury being sworn, this special case was made, viz: "The jury being sworn in this case, a paper writing was produced in the words and figures following, that is to say,

"Ten days after this 22d June, 1793, I promise to pay to *William Cutlar*, or order, for value received, one hundred and seventy-five pounds, ten shillings currency. Witness my hand and seal, day and date first above written.
£175 10.

JOHN HALL, (*Seal*)

(194) "On the back of said paper writing, were the following endorsements, viz:

"Pay the within to *Geo. Hooper*, or order. WM. CUTLAR."

"Pay the within to *J. Ingram*, Esq. or order. G. HOOPER."

"It appeared on inspection of the paper, that there was not a subscribing witness to it, but that there was a seal; and the Plaintiff's counsel offered a witness to prove the hand-writing of the Defendant, to support the action. To

this, the Defendant's counsel objected, as insufficient in law to support the action. Apr. 1795.

"The court therefore directed the witness to be sworn, and a verdict to be taken, and reserved the question of law, on the above objection, for further consideration.

"It was further objected in the case, that an action of debt cannot be maintained on the writing produced; whereon also, the court took time to advise: and it is agreed, in case the court shall be of opinion, that, on either of these objections, the Plaintiff ought not to recover, then a nonsuit shall be entered.

"But if the court should be of opinion, that both these objections are invalid in point of law, then judgment to be entered for the Plaintiff."

The witness not only proved the name subscribed, but also the word seal, written in the circumference of the seal and scratched with a pen, to be in the hand-writing of the Defendant.

At October term, 1795, the court gave their opinion as follows:

Judge HAYWOOD—Before we proceed to the immediate investigation of the first question—Whether, in the case of a sealed instrument, unattested by any subscribing witness, the hand-writing of the party may be admitted in evidence; it may be proper to take a view of the origin of deeds, in our law; and of the various changes and alterations the law has undergone, with respect to that species of instruments, in order to be accommodated to the different circumstances, which different periods of time have produced. This may have a stronger tendency to place the present question in a true light, than perhaps any method of treating the subject that could be devised.

Let us consider, therefore, 1st, the origin of reducing contracts to writing;—2dly, the origin of sealing, with the uses that have been made of it at different periods;—3dly, the origin of delivery.

We will then consider the only circumstance essential to the constitution of a deed at this day: and lastly, from all these premises, we will draw conclusions applicable to the point now in controversy.

I. All writers agree that the northern nations of Europe, who spread themselves over the southern and western parts of it, were an illiterate people, who despised

Apr. 1795. all arts but those of war. The Saxons who founded the heptarchy in England, and afterwards the English monarchy, were part of those people—they had, in general, no knowledge of letters—their laws and customs, their legal ceremonies, were preserved and transmitted to others and to posterity by tradition only. To keep up a military spirit, and to have a band of warriors always ready at command, it was the universal practice of the conquering leaders of these nations to divide the conquered country into allotments, which were parcelled out to their followers:—first, at the will of the lord or leader; next, for the better encouragement of agriculture, for life; and, last of all, for ever or in fee. About the time when it began to be usual to make these grants for life, the Christian religion, under the auspices of the Papal see, was propagated in England by *St. Augustine* and others, and was soon adopted and received as the national religion. Its priests were men of some learning—they here, as in all other places where they have been received, began to grasp at temporal advantages—they inculcated upon the minds of the people, that it was an act of the most meritorious piety to provide for the maintenance of the ministers of God. This doctrine had its effect, and donations of allotments of land began to be made to the Church, also for life: but this life was supposed to be perpetual, as the Church never died. The donations of these allotments, for want of a better method of perpetuating the transaction among the laity, who knew nothing of letters, had always been made by livery of seisin, done in the most solemn form, to impress it on the mind, before a number of the co-vassals or tenants of the lord; who in case of a dispute, were assembled in the lord's court, and determined chiefly by the remembrance which these impressions had made between the parties. The presumption was, that if some who were present, from length of time, had forgotten some of the circumstances or conditions annexed to the donation, others of them might remember them, and so, by the united remembrance of all together, might, in the end, ascertain the true state of facts. This, by the way, I suspect was the origin of juries, and of the unanimity required in their decision.—Each juror contributed the circumstances lodged in his mind to the general stock of information which formed the verdict; and by conference with his fellows, brought

to their recollection the circumstances which he remembered, and the others, or some of them, had forgotten, until at length the whole transaction was renovated in the minds of all. This mode of conveyance answered the purpose sufficiently, when donations were for the life of an individual only; for it would seldom happen that he would survive all the other *pares* of the lord's court, who were present at the investiture. But when donations were made for life to a churchman, for the benefit of his Church, and it was a received maxim that the Church never died, this method no longer answered the purpose as to them; for the donation might have continuance, and the conditions upon which it was made, might come in question, after every one of the *pares* present at the investiture were no more, and then the allotment might be liable to be resumed by the lord; all lands included in his territory or manor, not granted to one of his vassals, belonging to him; and, after the death of all the *pares*, no evidence remained of the investiture, much less of the conditions annexed thereto. It became necessary, therefore, when the Church was concerned, to have some other mode of perpetuating the transaction than mere livery of seisin; and the Clergy being the learned part of the community, devised the mode of reducing the terms of the donation to writing. *Sullivan* 82. And when the lord, on account of sickness, the distance of the land from his place of residence, his being employed in some other business, or some other cause, could not go upon the land to make livery, then the writing containing the terms of the donation was solemnly delivered, before the peers of the court also, in lieu of the land; to the end that, being delivered before them in so solemn a form, they might be witnesses of the investiture of the land mentioned therein, and might be able upon trial to ascertain the identity of the paper delivered should the dispute happen in their time. This was not indeed, a complete investiture of itself, it was termed the improper investiture, and bound the lord to make a more formal livery of seisin of the land contained in the deed at a future day, and was a sufficient security to the donee in the *interim*. Experience evinced the safety and certainty there was in reducing these landed contracts into writing in the case of churchmen, and the laity, wishing to be as secure as possible in their possessions, adopted by degrees the same method; which afterwards, when these allotments were ex-

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Apr. 1794. tended to the heirs of the possessor, became equally necessary for the laity as the Clergy, and from that time, deeds of feoffment, to accompany the livery of seisin, became generally used, though the livery of seisin, was good without them; and these contracts in writing, being found so advantageous in perpetuating the terms and conditions of a landed donation, were, by degrees, converted to the purpose of perpetuating other contracts, that concerned only personal estate, which formerly, amongst the unlettered Saxons, were completed by shaking of hands only, 2 *Bl. Com.* 448.

II. The preserving the remembrance of a landed contract, having thus become general in the times of the Saxon government in England, and the general illiterature of the laity of all ranks prevailing universally, it was customary for them to put some mark, usually the sign of the cross, to identify, as well as they could, the writing they had agreed to; and this was done *coram paribus*, who, upon the trial, might remember it, or be able to distinguish it from some circumstance attending the making the deed or the mark itself. But upon the Norman conquest, it became the policy of the conqueror and his sons to abolish the Saxon customs, and for this purpose to draw as many causes as possible to be determined in the *curia regis*, where the judges were Normans. *Sulliv.* 339, 343, 369, 374, where the *pares* of the neighborhood were frequently not called upon to decide between the litigants, as they uniformly were in the courts of Saxon institution, the county court, hundred court, &c. About this period the Bishop was separated from the Sheriff in his county court; and it was established as a rule, that the county court had not cognizance of any demand of more than forty shillings value; the consequence of which must have been, that all causes were carried into *curia regis*; and it must frequently have happened also, that the marks affixed to the deeds, for want of the *pares*, were incapable of any distinction, and of course, any proof of the identity of the instrument. This produced an inconvenience. The greatest men among the laity could not write their names, so as to give a proof of identity that way, and being under the necessity of providing some more certain criterion of identity, than that of the sign of the cross, they introduced for the first time into England, the practice of impressing their writings

with a seal. *Sulliv.* 374. *Terms de ley, verbo Fait.*—Apr. 1795. *Gilb. law of Evid.* 17, 18, 20, 78. The seal exhibited the emblem which its owner had affixed to his person, when covered in the field with his coat of mail; and which being portrayed upon some conspicuous part of his dress, served to designate his person. These symbols came to be very much in use at the time of the crusades to the Holy Land, in the time of *Richard I.* and after, and were continued by the knights and other persons, who then used them by way of distinction in their families after their return home. The seal, therefore, of any distinguished person, could immediately be known by inspection only. This method of sealing, however, was not introduced all at once, but by degrees. It was at first only used by such as were entitled to those distinguishing symbols—by the nobility and gentry only. For *Lucie*, Chief Justice of *Henry II.* reprimanded a common man, who had made use of a seal, saying, that belonged to the nobility only. *Terms de ley, ubi supra*, and several other books. But it is to be remarked, that about this period, and for some time before, the common people had but little use for seals, as they could have but few contracts. The conquest had introduced the maxim of non alienation without the consent of the lord. A great number of them were villains, who could not acquire property at all but for their masters; and as to the feudal tenants, they were continually harassed by attending their lords in war. Commerce had not yet begun to flourish and increase the personal property of the nation. The old law authors of those times have scarcely a chapter upon personal property. 2 *Bl. Com.* 385. And even when the doctrine of non alienation began to wear away imperceptibly, the common people, being not entitled to any family distinction, had no seals, and were obliged to contract as formerly was used before the introduction of sealing. The uncertainty of such a method begat, in combination with other circumstances peculiar to those times, the practice of conveying by fine; where the whole transaction, with the precise terms of the conveyance, were recorded in one of the King's courts, and obviated completely any future controversy respecting the execution of a deed. At length, however, the eyes of the nation began to be opened to their true interest; trade flourished; agriculture was encouraged; personal property

Apr. 1795. increased ; lands, or part of them at least, began to be freely alienated ; they were made liable to answer the debts of the merchant, and as to part of them, the debts of any other proprietor. Contracts, both for real and personal property, became frequent among all ranks of men. The necessity of authenticating their written contracts became urgent ; they of course used the best mode then known. They broke through the privileges of the nobility and gentry, and made seals with such impressions as each man's fancy suggested to be the properest mark for distinguishing his contracts. By the time of *Edward III.* seals were in general and common use.—*Terms de ley, ubi supra.* *Cunningham*, Title deeds, who cites *Perkins*, 229, and *sequentia*. And it became a rule of law that a deed could not be constituted without a seal ; and the method of signing with the sign of the cross, or some other mark, had gone into total disuse. Thus it seems clear, that the seal was originally introduced in the place of signing, as an evidence of the identity of the writing which contained the party's agreement, and afforded a full proof thereof by the inspection of its impression only ; and signing by the party was held unnecessary and useless. In reality it could contribute but little to the proof of the writing, as long as the illiterateness of the people continued ; which was until sometime after the introduction of printing into England, in the time of *Edward IV.* insomuch that as late as the time of *Henry VII.* the being able to read was held to be a legal proof of a man being a Clergyman, or clerk in orders, 4 *Bl. Com.* 360.

This universal use of seals, however, produced its inconvenience, when every man who made a contract was obliged to use a seal to authenticate it. Many of those seals were not known to the jurors, and they could not determine in many instances, on the authenticity of the instrument upon the inspection of the seal only. They were under a necessity therefore, to call upon those who were supposed to know the seal which the party used, to say whether that was the impression of his seal or not ; and upon this evidence they decided, and sometimes upon the comparison of the seal with the impressions upon other instruments which were proved to be sealed by the party. But still, in contemplation of law, these seals were held to contain an intrinsic evidence in themselves

of the contract to which they were affixed; and therefore, as well as for the purpose of being compared, the rule of law was, that they should be carried out by the jury.—*Gilb. Law of Evid.* 20. But with respect to those seals which still retained sufficient distinction in themselves as the great seal, the seals of the courts of justice, the seals of corporations, and some others, no proof as to them was required or perhaps was allowed. They still continued to answer the genuine purposes of seals at their first introduction, and were full evidence of themselves. The people began at length, to forget the original use of this institution, and to seal with any impression they could get; and the law, rather than invalidate the whole transaction, left it to the jury to decide whether that was the seal of the party or not. In this country the people have departed still further from the true use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal. To the first of these abuses the law has conformed, and will now deem the sealing to be sufficient, if found by the jury to be the seal of the party.—For fear of destroying some contracts improperly made at first, it has relaxed from strict propriety, and the practice of sealing with any impression has become general; and is now from necessity, allowed to be good in every instance. *Cunn. verbo Deeds*, cites *Perkins*, 129, 34.—*Cro. Car.* 149. *Gilb. Law of Evid.* 20, but still the contemplation of law is in conformity to the ancient use of seals. They are deemed the signs of authenticity, are supposed to have an intrinsic evidence in themselves, and for that reason are carried out by the jury. *Gilb. Law of Evid.* 17, 20, cites *Sid.* 145, *Hard.* 118, *Plowd. Com.* 411, and *Sir Edward Coke*, speaking of deeds, page 6 b, says, “also the deed may receive credit *per collationem sigillorum, scripturæ, &c.*” and *Baron Gilbert*, in his note upon 2 *Bac. Ab.* 494, says, “the seal appearing, it must be presumed to be put there by the parties to the deed;” and cites *Leo.* 25, *Owen*, 23, and *Bend.* 1.

In the reign of *Henry VII.* and *Henry VIII.* learning, and the art of writing, had become much less general than in former times, and by this time also seals had become much less a mark of distinction, and proof of the individual contract made by the parties, than in former reigns: but the rule, that the deed must be authenticated

Apr. 1795. by the party's seal, had passed into settled law. In order, therefore, to give a sure proof of the seal which proved the writing that contained the agreement of the party, subscribing his name at the foot of the instrument, immediately after its conclusion and prefixed to the seal, in the same place and in the party's own handwriting, began to be used. *Noy. 163.* And although it was held in conformity to the rule then established, and which has ever since continued, that such a signature was not necessary to the essence of the deed; yet where the jury could not decide with respect to the deed, upon inspection of the seal merely, nor be satisfied by a witness who knew the impression, nor by a comparison of the seal in dispute, with other seals made use of by the same party, they were allowed to form their judgment upon the handwriting of the party prefixed to the seal; and that was the *scripturæ* intended by *Sir Edward Coke*, in the passage above cited, where speaking of the doctrine of deeds and of presumption, he says, "also the deed may receive credit, *per collationem sigillorum, scripturæ, &c. et super fidem cartarum: mortuis testibus erit ad patriam, de necessitate, currendum.*" *Co. Litt. 6 b.* It may be here supposed he meant the handwriting of the witnesses; but this is not his meaning, for he says expressly, in the very next page, that the clause of *hiis testibus* is not essential to the deed; and in *page 6 a*, he says, "very necessary it is," by which he means advisable or prudent, "that witnesses should be underwritten or endorsed for the better strengthening of deeds," (not that it is absolutely necessary to make them valid) "and their names, if they can write, written with their own hands," not that they must necessarily be subscribed with their own hands. Even at this day, there were many witnesses who could not write their own names, and their names were to be endorsed; and when these witnesses, namely, witnesses who had not subscribed their names in their own handwriting, could not be found or were dead, then the deed was to receive credit *per collationem sigillorum et scripturæ*, coupled together. This proves the position, that the signature of the party was used as a proof of the seal. If it was not evidence of the seal, then it was in vain to prove the handwriting at all: for that of itself was totally unessential to the deed, and made no part of its essence, as the same author had said in the page last

preceding, and as is held to be law at this day. *Salk.* 402, Apr. 1795. *pl.* 2. And, that the proof of the signature of the party, when admitted, is used as a proof of the seal, is avowed in terms almost unequivocal, by *Baron Gilbert*, in his *law of evidence*, 99, 103, where he says, "for though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is not full proof of the deed, for the delivery is necessary to the essence." Does not this manifestly imply, that the proof of the handwriting proves every thing, which is of the essence of the deed, but delivery only: and of course, that it proves the seal? With respect to an attested sealed instrument, it is the common practice in the English courts, where the witnesses are not to be found, to prove both the handwriting of the witnesses and of the party. *Bl. Rep.* 532, *Forbes, executors, &c. v. Wale*, such proof admitted before *Lord Mansfield*, to be given. — 2 *Brown's Ch. Rep.* 536, 538. The same proof admitted before the *Lord Chancellor*, and stated by the counsel opposed to the fact it meant to establish, to be evidence in the common form. The same proof must also have been admitted in the case of *Gould and Jones*, reported in *Bl. Rep.* 384, as may be seen by having recourse to the case itself; and the same kind of proof was clearly admitted in the case of *Coghlan and Williamson*, reported in 1 *Doug.* 93. But why in all those cases is the proof of the party's signature held necessary, if proof of the witnesses' handwriting proves both sealing and delivery, and not the delivery only? From the reason of the thing itself, and more especially from the great weight of these combined authorities, it seems to be a conclusion fairly warranted, that at this day, whatever it might have been formerly, the seal is in some instances proved by the signature of the party. This holds in all those instances where the signature of the party is admitted to be proved: and that the seal always since its first introduction has been used as an evidence of the writing, in which the party has deposited his agreement.

III. With respect to the delivery, I have no more to add to what has been already said relative to its coming into use instead of the livery of seisin, and being, like that, made in solemn form *coram paribus*, to the end it might make the deeper impression in their minds, than that this solemn delivery of the deed *coram paribus* being

Apr. 1795. found to be well calculated to make the desired impression in the case of landed contracts; and also, from the same solemnity, to excite in the party a reflection upon the subject he was engaged in, it was continued in other contracts; and, like the seal, was considered an essential ingredient to the constitution of the deed. Here, it may not be improper to remark upon the excellence of this institution when once established, though introduced gradually and for other purposes, in preventing all manner of surprize upon the party. It was first to be written; this necessarily employed some time; he had the interval for reflection; it was to be read over to him if he requested it: then the wax was to be prepared and melted; next a seal to be procured; then an impression to be made; thus gradually approaching to the final act, still giving time for reflection, and exciting by each new act still greater apprehensions; and last of all, lest the former precautions might not be sufficient to put him upon reflection, he was called to go before the *pares* of the neighborhood, and make a solemn delivery of the instrument. After all these ceremonies were complied with, it was scarcely possible to believe, that the party was circumvented by fraud, or surprised into what he had done. After the *pares* were disused, and the authority of the county and hundred courts diminished, I apprehend a delivery before the *pares* went out of use, but that a delivery of the contract was still used as a sign of the party's assent to the contract contained in the deed, and has ever since been deemed necessary to give it its final validity.

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Such seems to be the origin and progress of the several circumstances of writing, sealing and delivery of deeds, which came into use, not all at once, but at different periods of time; and were used for perpetuating, authenticating and proving the complete and final assent of the party to his contract. Any other concomitant circumstances, besides those, though they have been sometimes used, and said to be incident to deeds, as signing by the party, subscription by witnesses, and many other, as may be seen in *Co. Litt. 7, a*, yet they have never at any period of time, been held material to the essence of the deed; unless perhaps in some instances, where such circumstances have been required by statute: and that these are the only necessary circumstances is proved by all law writers both ancient and modern. *Co. Litt. 7 a*.

says, "I have termed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment. For if such a deed be without premises, *habendum, tenendum, reddendum*, the clause of *warranty*, the clause of *in cujus rei testimonium*, the date and the clause of *hinc testibus*; yet the deed is good: for if a man by deed gives lands to another and his heirs, without more saying, this is good, if he put his seal, deliver it, and make livery accordingly." Wood in his *Institutes*, adds "where livery of seisin is necessary," importing as Lord Coke clearly did also, that if it were not a deed of feoffment, but a deed of some other kind, then putting the seal and delivering the writing, would make it a good deed. The same definition is given, and the same circumstances only mentioned as necessary, in 2 Rep. 4, 5. 10 Rep. 92. 3 Bac. Ab. 393. 2 Bac. Ab. 493, who cites 2 Roll's Ab. 21. 1 Nels. Ab. 623. *Terms de ley, verbo Fuit*. Co. Litt. 171, b. Gilb. Law Evid. 78. *Shepperd's Touchstone of common Assurances*, and many others.

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After the production of this concurrent testimony of so many authors, it seems scarcely necessary to say that the subscription of witnesses in their own handwriting to a deed, was never held necessary to its constitution. The reasons already assigned for the first introduction of seals and their continuance for a long time afterwards, namely, the illiterature of the laity, proves also that the subscription of witnesses was not used during that long period, which commenced soon after the conquest and continued to the time of Henry VII. and Henry VIII. Even the *Magna Charta* of King John, given at Runningmead in the year 1215, mentions the Archbishops, Bishops, Barons, &c. not particularly naming them; and in the end is attested in this manner, *testibus supra dictis et multis aliis*; and lest any thing should be added or subtracted from the form of the writing, he thereto put his seal.—*Bl. Law Tracts*, 35, 36. In 1216, the first charter of Henry III. is attested thus, *testibus omnibus prenominationis, et multis aliis*. I infer from this, that in a matter of so much moment, they certainly used the best method of attestation then known or used, and as they did not subscribe their names, it is an evidence that the subscription of witnesses in their own handwriting was then not practised. The attestation of private deeds was in the same manner—the names of the witnesses were underwritten

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or endorsed, and this was used only as a memorandum to show who of the *pares* were present, to the end they might be called upon and associated to the jury, upon the trial of the issue, when the deed was denied. *Vide Co. Litt.* 6, *a* and *b*, and sometimes it was said, *teste comitatu, hundredo, &c.* 2 *Bl. Com.* 307. I apprehend the practice of subscribing by the witnesses came into use at the same time with the subscribing by the party—at a time when the law respecting deeds was already firmly established, and when both these circumstances were held unessential, though perhaps both of them at the time might be useful—the signature of the party to prove his seal and that of the witnesses, when they could not be found to prove the delivery of the deed. For when it was proven by his own signature to be the seal of the party, there arose a very strong presumption from the proof of the handwriting of the witness, that they had been present at the delivery. But this kind of proof was only resorted to when positive testimony could not be procured, and was not in the party's power to produce. To proceed a little further, the statutes of 2 *Edw. II.* and 9 *Edw. III.* speaking of the trial upon the issue *non est factum*, say, “the witnesses shall be summoned where there are witnesses named in the deed, but if they do not appear at the day appointed, the trial shall proceed notwithstanding their absence.” Hence the conclusion follows, that in those days there were some deeds without witnesses named in the deed, and as to them, there was no delay of trial. Secondly, that there were other deeds wherein witnesses were named, and that as to them, the trial could not be in their absence, for they were to be summoned and make part of the jury. Thirdly, this statute directs that they shall be summoned as usual, but in case of their non appearance, the trial shall nevertheless, go on by the jury that are present. Fourthly, that there was some other method then used of proving a deed, than by the witnesses named in the deed, or else this statute operated injustice by ordering the trial to proceed upon the first default of the witnesses (who perhaps might be convened at another day) and by so doing rendered the deed invalid and void; and this it is unfair to presume. That it could be proved by other means, is held by *Lord Coke* 121, *b*, where he assigns reasons why the law requires the proffer of a deed in pleading to the court, *viz.* that it may

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he proved by the witnesses, or other proof, if denied.— Apr. 1795.
 This opinion is strongly confirmed by some modern decisions, where the rule of law is held to be, that a witness shall not be permitted to deny his own attestation. The true meaning of which rule is, that if he does deny it upon the trial, the deed may be proved by others who were not attesting witnesses, and whose names were neither subscribed nor endorsed. *Doug.* 216. 4 *Burr.* 2225.—
 This proves beyond all possibility of doubt, that the attestation of witnesses is not necessary: for if the delivery may be proved by persons who did not attest, in case of an attested deed, can there be any solid reason assigned why they may not prove the delivery in case of an unattested deed, where there are no witnesses to deny their attestation, and by that means bring a suspicion on the instrument? Upon this point I think it may be affirmed in perfect consonance with the rules of law, that at this day the attestation of witnesses, either by endorsing or underwriting their names in the handwriting of the drawer of the deed, or by a subscription of their names in their own handwriting, is in no wise essential to the validity of the deed: and from all those premises we may also infer some other conclusions.

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If writing, sealing and delivery, be the only essential parts of a deed, and the law deems it valid without the further ceremony of a subscription by witnesses, then there must be some other competent means of proving the deed otherwise than by subscribing witnesses. It would be absurd to attribute validity to an instrument that had these essential parts, and yet say it should not be read to benefit the party producing it, unless proved by subscribing or endorsed witnesses.—But what other means are competent?

To form a decided opinion upon this head, we must remember, that there is but one general rule in relation to evidence, and that is, that the law requires the best evidence. But this rule is always relaxed upon two grounds, either from absolute necessity, or a necessity presumed from the common occurrences amongst mankind. The rule is not so stubborn, but that it will bend to the necessities of mankind, and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind. One shall not deceive the jury by offering a less convincing testimony to establish

Apr. 1795. his point, when it appears there is a proof more elucidative of the point in controversy in his own possession or power, which perhaps he does not offer because it would be decisive against him. It was never meant to exclude the party from justice, merely because he had not, through ignorance, provided himself originally with the best evidence it was possible for him to provide: for then two witnesses would be better than one; a hundred better than two; and so on progressively. A writing would be better than a parol contract, a deed better than either, and a record better than all. Neither was it intended to deprive any one of justice, when, without any default in himself, he had lost the better evidence which he had provided originally. It first deprives him of the power of imposing upon us, and then lays itself open to be relaxed, as circumstances shall in justice require. These circumstances, as I began before to mention, are of two kinds; those founded on absolute necessity, and those founded on a necessity occasioned by those occurrences which are common amongst mankind. We will touch upon the first class only. In the case of deeds; if there be subscribing witnesses to them (see 1 *Atkins* 49, the argument of *Lord Hardwicke*, in the celebrated case *Ormichund and Baker*, and mark the implication) they must be proven by these witnesses. Because, it is presumed that these witnesses can give a more distinct and satisfactory relation than any others, having been called upon originally for that purpose; but if the witnesses be dead, or not to be found, and that be proved to the court, then the handwriting of the subscribing witness may be proved: that raising a violent presumption in favour of the deed. If the deed be lost, and that appear to the court, then the copy shall be read, as affording a presumption. But if there be no copy, then an abstract may be admitted, that affording a probable presumption; and if no abstract, parol evidence of the contract may be offered. The true intent of the parties to be regulated by that contract, shall not be defeated and justice overturned, so long as any evidence remains which throws any glimmering of light on the subject, from which a jury may be enabled to infer the real state of the transaction. The subscribing witnesses in the case above stated are not required, because the deed cannot be proved without them, as has been already evinced; but because were they not produced, the Defendant would be deprived of

the cross-examination of those persons he had provided Apr. 1795.
 to give testimony for himself, as well as for the other party; and who if produced, upon such cross-examination, would perhaps give material testimony for him. But if the subscribing witnesses are not to be had, the law chuses the least of two evils. It is better to dispense with the witnesses, and receive other proof which may be sufficient, than adhere to the rule when they cannot be had, and so, at any rate, destroy the deed; thus, if the obligee removes the witness, his acknowledgment that he executed the deed, is proof. *H. Bl. Rep.* 625.— In all cases, therefore, where it is apparent to the court, that there is no positive testimony to be had, there must be a recurrence to testimony founded on presumptions, or circumstantial proof as it is called. Therein requiring first the best presumptive proof that is to be had, and in default of that, the next best, until we have passed through all the several grades of circumstances that raise presumption, from that which *Lord Coke* terms the violent, until we arrive at that which excites the light presumption that moveth not at all.

If this be the true theory of evidence, and if an unattested deed, being valid, may some way or other be proved, as it certainly may; then in the first place the party must produce witnesses who were present at the execution, though not endorsed nor subscribed; as in the case where subscribing witnesses to an attested deed deny it, and if there are no such witnesses, then there must be a recurrence to presumptive testimony. And here, as in the case of an attested deed, when the witnesses were not to be had, proof of the party's signature would be admitted as a proof of his seal; so in the case of an unattested deed, I can see no reason why the same species of proof should not be admitted, where no better is obtained. There also, *Lord Coke's* doctrine, so often before cited, of comparison by seals, handwriting, &c. might be admitted. The law also will here chuse the least of two evils; and if sufficient proof of the seal shall be offered, other circumstances shall be admitted to prove the delivery. This is yet necessary. But a small matter is sufficient to establish it, when once the seal is proved to the satisfaction of the jury, as leaving the deed behind him after it was sealed and read, held a good delivery. *Cro. Eliz.* 7. *Shippen's case*. So where an obligation was written in a book, and the party put his hand

Apr. 1795. and seal to the leaf in which it was written; adjudged this was sufficient, though there was no evidence of a delivery. *Cro. Eliz.* 613. *Fox v. Wright*, and many other cases to the same effect. If no positive testimony can be given of a delivery, the party must be allowed to prove such circumstances as will induce the jury to find a delivery. In these two cases last cited, it is surely more compatible with justice, and the rule of evidence in similar cases, to admit, than at once to destroy the deed by rejecting such circumstances which the jury might deem sufficient to convince their minds, together with other circumstances they might themselves be acquainted with. Surely there are a great variety of circumstances from which a delivery might very properly be inferred. Suppose a deed of feoffment produced, and the hand-writing of the party proved, and also possession according to the deed. *Co. Litt.* 6, *b. Gilb. Law Evid.* 100. Suppose part of the principal be paid upon a bond by the Defendant, or interest: or suppose the bond should be shewn to him, and he requested the party not to bring suit upon it: suppose the bond sufficiently described in a letter and acknowledged. *2 Nels.* 762, *pl.* 45. *2 Eq. Ca. Ab.* 413, *pl.* 9. Suppose upon the back of the bond he enter an endorsement taking notice of it as his bond. *Buller* 254. *C. K. B.* 500. Suppose he state it in a bill or answer in Chancery. *Buller* 236. Suppose he has made a parol confession of it. *Doug.* 92, 216, in which last case, the proof evidently would have been deemed sufficient had there been no subscribing witness. Or, by like parity of reason, suppose any other possible circumstance from which a jury might justly and fairly infer a delivery, surely it ought to be received. Even the possession of the obligee, where the other party could not shew the illegal commencement of that possession, might afford a presumption in favor of the deed. But, as there is no case to warrant me in going so far, I will not yet say that that circumstance alone should be left to the jury. But such circumstances, as are before mentioned, and all others of equal weight, I do think should be left to them, to infer a delivery from or not, according to the best of their judgment. Therefore in the case stated, I am of opinion, that the witness was properly admitted to prove the signature of the Defendant; and that the jury were at liberty to infer from thence, that the seal affixed

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was the seal of the party; and as the admissibility of this evidence is the only doubt stated, as the jury have found a verdict in favor of the Plaintiff subject to that doubt only, it must be intended there was some other circumstance given them in evidence sufficiently evincing the delivery: and therefore as to the first objection stated in this special case, there ought to be judgment for the Plaintiff notwithstanding.

It seemed to be insisted on at the trial, that the clause "In witness whereof, I have hereunto set my hand and seal," might be received as an evidence of the seal; and as some case may hereafter occur, in which that clause may have only the words "In witness whereof, I have hereunto set my hand:" when in fact there may be a seal affixed, I will remark upon this clause a little; more especially, as it is set down in this special case, and the opinion of the court is expected upon it. I would observe then in the first place, that this clause contains a part of the words of the deed, and the deed itself, or any part of it, cannot be read, until the sealing and delivery of it be first proved; and of consequence, this clause cannot be read to prove the seal until after the seal has proved the clause itself: and then as to the purpose of its proving or disproving the seal, it is totally useless; and, that such a clause is not only unnecessary in itself, but that the words of it have always been disregarded, is proved by such an abundance of authorities, that the bare citation of them will fully establish the position that the omission of this clause or the addition of it, or the words of it, can have no influence whatever upon the writing itself. Some of them are the following: *Co. Litt. 7, a. Salk. 714. 2 Rep. 5.* The deed is good, though this clause be omitted. *2 Nels. 623, pl. 7,* who cites *Moor 3.* It is not a conclusion of the deed: for that which is written after it, is as much part of the deed, as that which is written before. Also *2 Nels. 621, pl. 13,* who cites *3 Bulstrode 300.* "In witness whereof, I have hereunto set my hand:" the deed is good, if there be a seal, though the clause do not mention the seal. *Cunning. Dict. verbo Deeds,* cites *Hetty 75,* and by the like reason, if it mention hand and seal, still it can operate nothing. *2 Str. 814, 815. L. Ray. 1541.* For the seal is not established by the words of the writing, but *e converso*; the words contained in the writing are proved to be the words of

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Apr 1795. the party by his seal. And, if the words contained in this clause were allowed to prove any thing, the party to be benefited by the deed would have nothing to do but to insert this clause, "In witness whereof I have sealed and delivered," and the evidence of the deed would be complete. Suppose in the present clause that the word seal had not been in the clause, and yet the seal should appear, with the word seal within it, in the handwriting of the obligor, as was the fact here: would it not be a harsh determination to say it was not his seal? Yet we know such cases often occur.

1. It may be objected, that if the words contained in this clause are not suffered to have any weight, then the holder of a promissory note might add a seal to the name of the party; and by that means avoid the act of limitations, and also, circumscribe the party in point of evidence. To this, the answer is, that the rules of evidence were established long before the statute of limitations, and that act did not intend to alter them.

2. That the law has guarded against such attempt by making the writing totally void, if it should be attempted; and also subjected the party to very severe punishment for the attempt.

3. If there are witnesses, they may be produced to say what they know of the seal.

4. If there are no witnesses, the circumstances to prove a delivery, may throw some light upon the seal itself.

(211) 5. The law will not presume such turpitude in any man. The possibility of his committing such an offence will not vitiate the act, as if he had actually committed it; and in this case, as in all others, the injured party should prove the injury done him. Again, if the instrument should be held invalid, because possibly, the seal might have been affixed after the execution of it, then more good deeds would be destroyed upon suspicion, than frauds prevented by it. For few men will attempt a fraud of this kind, under the multiplied hazard of receiving infamous corporal punishment, and being forever degraded from their rank in society, and the total loss of the thing secured by the deed, especially if it be of great value. Experience shows that men, not well knowing the technical distinction between a seal and their signature, say, witness their hands, and put their seals also, and *e converso*, declare in this clause that they have put their hands and seals,

where they have subscribed their names only. Here, as Apr. 1795.
 in all other cases, the law chuses the least of two evils. 
 Once more, the subscribing witness to a bond may have
 subscribed, being about to depart for a foreign country,
 when in fact, the deed may not have been executed, but
 this possibility will not cause a rejection of such testi-
 mony, nor shall the seal be rejected because not mention-
 ed in the clause, for such possibility as is in the objection.

But it may happen in the case of an unattested bond,
 that there may not be sufficient evidence by circumstances
 to prove the delivery; and this brings us to another
 question referred to the court in this special case, which
 although it is not necessary to be considered in order to
 the determination of the case, which is an action of debt,
 and depends entirely upon the question, whether this be
 the deed of the party or not? Yet, as it has been refer-
 red to the court, I suppose, for the purpose of having the
 law settled upon this point also, I will make a few re-
 marks on it.

The question is, whether an action on the case lies up-
 on such an instrument, when it cannot be proved as a
 deed.

As to this, there is one rule certain, that no sealed in-
 strument can be given in evidence to support an action
 on the case. *Gilb. Law Evid.* 100. *Cro. Jac.* 506, 508.
 The law has given a remedy of another sort upon those
 sealed instruments. An action on the case, depends up-
 on parol evidence or writing only. Therefore the action
 on the case must necessarily be destroyed, when the evi-
 dence to support it is destroyed by extinguishment; and
 all parol contracts and agreements are held to be extin-
 guished when they become clothed in a contract of great-
 er solemnity, or evidenced by a sealed instrument; as
 these sealed instruments are themselves extinguished, so
 that no action can be supported upon them between the
 same parties, when they have passed *in rem judicatum*,
 and have become matter of record. All this depends up-
 on the rule of law already mentioned, that the best evi-
 dence shall be required. Thus, a bond shall not be evi-
 dence when there is a record of the same matter, nor pa-
 rol evidence when there is a sealed instrument. This
 rule of law is not to be denied; and then the whole ques-
 tion is reduced to this—whether when a seal appear, the
 party who produces the writing to which it is affixed,

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Apr. 1794. shall be permitted to say it was not affixed to the writing originally? It has been for a long time a standing rule of law, framed first indeed, for the protection of deed, the only written instruments then in use, for unsealed instruments are but of modern date. 3 Term 380, but in policy extended to every written contract, that the least alteration in any material part, shall render the whole totally void; and even, an immaterial alteration, made by the holder of the instrument, shall make it void also. 11 Rep 27. A bill of exchange, payable three months from the 26th of November, was held to be totally void; it being found by the jury that the top of the figure 6 was blotted out, while in possession of the holder, so as to make it appear to be the 20th instead of the 26th, and by that means to accelerate the payment; though in fact no such acceleration of payment had been attempted. 3 Term Rep. 320. Now then to apply these rules to the case in hand, if the seal was not affixed to the instrument at the time of its execution, and the addition of the seal afterwards be an immaterial alteration only; then the instrument being in possession of the holder or obligee, the presumption will be that it was added by him, and will turn it upon him to prove how it came there, like the case where the seal was torn off by a child—this raised a presumption of the deed being cancelled, and turned it upon the Plaintiff to show how the seal came to be torn from the writing. Cro. Eliz. 120. Palm. 403. Latch 226. In the case of the bill of exchange, Lord Kenyon, speaking of the blot which made the alteration, said, if it had been done by accident, that should have been found to excuse the party. He thought the alteration having been made after the instrument came to the possession of the payee, raised so strong a presumption of his guilt, that in point of law, the instrument should be deemed void, unless he could show the blot happened without his privity: and so I am induced to think in the present case, that if the addition can be considered as an immaterial addition only, yet to make men careful to preserve their written instruments free from alteration or addition, it is good policy in law to suppose the alteration or addition made by the holder or obligee himself; therefore the moment he shows a sealed instrument, and says the seal was not originally affixed to the writing, the whole instrument must be deemed void, unless he can show that the

seal was affixed to it without any privity of his. But I ^{Apr. 1795.} take it, the addition of a seal is not an immaterial alteration only. It avoids the act of limitations—it excludes the giving of parol testimony to explain or control the writing in any shape—it makes the party liable to another kind of action than that he at first stipulated—it deprives him of that latitude of evidence he might have had in the action on the case; and before the act for the amendment of the law, would leave him, in the case of a single bill as this is, no method of discharging himself, but by a release or acquittance under seal. In every point of view therefore, the addition of the seal is a most material alteration; and if it be material, then no matter how it happened, or by whom the alteration was made, the whole instrument is totally void, and no action whatever can be supported upon it, no more than if the seal had been torn off to make way for proof of the writing as a simple contract. The law requires that the contract shall remain unaltered—that the party may not be subjected in any other shape or manner than that which he has consented to. Besides, if when the signature of the party is proved, that stands as presumptive evidence of his seal; then an unattested instrument being produced, and the handwriting of the party proved, the presumption instantly arises and will stand for truth, until the party Plaintiff shall overturn it by evidence, accounting for the affixing of the seal, and that it was done without the knowledge of the Plaintiff, or any criminal intent in him—and so *quacunque via data*, the seal appearing, it must be accounted for, to say the least, by the Plaintiff himself—and therefore I am of opinion, upon the last point reserved in this special case, that debt is the proper action to be brought upon such an instrument as is therein stated; and that the action on the case can, in no instance, nor in any possible case whatever, be supported upon it—and this opinion receives credit from the argument of Justice *Heath*, in the case of *Gibson & Johnston v. Minor & Foster*, reported in *H. Bl. Rep.* 622, where, *arguendo*, he lays it down as clear law, that if the delivery of a bond cannot be proved, it cannot be concluded that it may be given in evidence as a note should—because the creditor having taken his security in a determined form, he cannot at his pleasure alter it against the stipulation of the debtor; and yet says he, the obligation includes a promise to pay money. (214)

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Judge MACAY was of opinion the instrument must be declared upon as a sealed instrument.

Judge WILLIAMS was of opinion that the instrument could not be proved as a sealed instrument, for want of attestation ; and therefore ought to be declared upon as a writing only.

Judge ASHE seemed to dissent from the opinion of Judge MACAY ; but concluded that there should be judgment for the Plaintiff.

NOTE.—The law of this case is now so well established, and it is so common for an unattested bond for the payment of money to be declared on as a sealed instrument, and proof of the obligor's handwriting to be admitted, not only as evidence of the seal, but also, coupled with the Plaintiff's possession, as evidence of the delivery, that we are surprised it should ever have been held otherwise. The case of *Clements & Co. v. Eason & Wright*, ante 18, and the division of the court upon the question in this case, show that a contrary opinion did once prevail. But, the very able exposition of the law upon the subject by Judge HAYWOOD, in this case, exposes at once the erroneous grounds upon which that opinion was formed, and establishes the true position beyond the reach of doubt or controversy.

Strong v. Spear.

An indorser may sustain an action in his own name, the possession of the note being *prima facie* evidence of payment to the indorsee.

Debt, and *non est factum* pleaded: upon the trial the bond was produced, and it was endorsed with an assignment to a *Mr. McKay*—whereupon it was objected by the Defendant's counsel, that the interest of this bond being in *McKay*, the present action by the original obligee could not be supported ; such assignment by 1786, c. 4, vests the whole property of the bond in the assignee.

Per curiam, this case is like that of *Smith* and *St. Lawrence* lately decided at Hillsborough ; the bond being in the possession of the endorser, is evidence *prima facie*, that he has paid the endorsee for it. Endorsers frequently bring suit upon bills endorsed by them, when the endorsee is refused payment, or cannot obtain it and returns the bill, receiving payment of the endorser himself. The case in *Show*. 164, of *Dickens v. Harriott*, is very similar to the present—there a bill was drawn upon a person in Dublin, the payee endorsed to *Dickens*, and he to another, who demanded payment, and protested for non payment—*Dickens* then sued, and it was amongst other things objected, that the interest was vested in the

last endorsee, as appeared by the endorsement—then Apr. 1795. merchants were examined, who said, whenever the bill was returned into the possession of the last endorser, he might maintain an action. The court recited this case upon memory only, the book not being in court—and judgment in the present case was given to the Plaintiff.

NOTE.—Some of the bar seemed dissatisfied with this decision, as they were with that of *Smith and St. Lawrence* at Hillsborough. The case cited from *Showers*, says, above twenty merchants were examined, and affirmed that the Plaintiff had a right to the action, although he had endorsed to *D.* the bill being returned into his possession; but then the endorsement in that case was, pay to *D.* value on my account: perhaps this made *D.* only his servant or agent, in the same manner as if it had been pay to *D.* for my use. See 2 Burr. 1227.—*Doug.* 117, 639. The case of *Smith and St. Lawrence* was founded upon the case in *Str.* 1103. Where the court permitted the Plaintiff to strike out the endorsement, but that was a blank endorsement only. It was also founded in part upon 1 Lut. 885, where the second endorser supported an action though there were two subsequent endorsements to his own appearing on the bill; but there he stated in his declaration, that the last endorsee not being able to procure payment from the acceptor, he the Plaintiff, who was the second endorser, paid it to the last endorsee, and became again entitled to the bill. The payment was actually alleged and not denied. And in *Claxton and Smith*, 5 Mo. 86. 2 Show. 441, 494, the payment seems to be relied on, as that which entitled the endorser to the action. *Kidd.* 75. Also the case in *L. Ray.* 742, 743, where the last endorsee sued the second endorser, and recovered; whereupon the second endorser sued the acceptor, and upon the trial produced the bill and the protest; but because he produced no receipt for the money from the last endorsee he was nonsuited, and all the court concurred—that there must be payment to re-vest the property of the note, strengthens the opinion that payment is necessary. The necessity of a payment to re-vest the property of the note in the endorser, must be admitted; and is not denied in the cases of *Strong and Spear*, *Smith and St. Lawrence*, and *Dook and Caswell*—the only point of difference between these cases, and those decided in the books, is this, that the books require actual proof of payment by a receipt, or at least *viva voce* proof. These cases allow the possession of the endorser to be presumptive evidence of payment—as the payee or endorsee of a bill is never obliged to part with it until he has received payment from the endorser, which is a circumstance which renders the presumption very strong. *Kidd.* 88. *Beaves.* 461.

NOTE.—Vide note to *Dook v. Caswell*, ante 18.

Adams v. Spear.

Debt, and *non est factum* pleaded: the bond was produced on the trial, and appeared to be a bond in the penal sum of six hundred and twenty five pounds, with condition to pay one half of that sum. The writ was for the sum mentioned in the condition, and of course the decla-

Apr. 1795. ration was supposed to be for the same sum. *Et per curiam*, the condition; no part of the obligation, it is inserted for the benefit of the obligor, to exempt him from the payment of the penalty if he chuses to comply therewith; but he has his option not to perform the condition, and to forfeit the bond if he is so disposed—consequently the bond produced, which is for six hundred and twenty-five pounds, does not agree with the bond set forth in the declaration—but as it has been a practice agreed upon by the bar, to suffer an alteration in the writ when issued by the Clerk as this was, where he has committed a mistake, we will now recommend to the opposite attorney to consent to the alteration. However he would not consent to the alteration at present, but agreed it should be made at any time after this day.—Whereupon by consent a juror was withdrawn.

NOTE.—*Vide Anonymous*, post 401, and the note to *Cowper v. Edwards' Adm'r.* ante 19.

(216) **Surviving Partners of Auley McNaughton and Co. v. William Norris, Surviving Partner, &c.**

Assumpsit for goods, wares and merchandize sold and delivered. General issue and statute of limitations pleaded; and the principal question of law was, whether the act of limitations runs from the date of each article in the account, or from the date of the last article only.

Et per curiam, the act runs from the date of the last article in the account only, where the account has been running on from its first commencement; but where it is once deserted or ended between the parties, then from that time. Verdict was found accordingly, and the Plaintiff had judgment.

NOTE.—*Vide Kimball v. Person's Adm'rs.* 2 Hay. 394. 2 Saund. 127, note 6 & 7.

Administrators of Hostler, Assignee, v. Patterson and others, Sureties of McIver, late Sheriff.

The Sheriff had returned to an execution, that he had levied monies thereupon to the amount of £157, 8s. 4d. and now the question was how judgment should be taken—whether for the penalty of the Sheriff's bond, to be discharged by the payment of the £157, 8s. 4d. and costs,

or simply for that sum not regarding the penalty; and at length it was entered up for £157, 8s. 4d.—one of the Judges agreeing thereto, *reluctanter*. See 1777, c. 8, s. 2. Apr. 1795.

NOTE.—The practice now is to enter up judgment for the penalty of the bond, to be discharged by the payment of the real damages assessed by the jury.

———v. Administrators of Richard Kenon.

The objection that a joint obligor is not sued, must be made by plea in abatement at the proper time: it cannot be made at the trial of the cause. Such a plea cannot be made at all since the act of 1789, *Rev. c. 314, s. 4.*

Debt, *non est factum*, payment and set off pleaded; and upon the production of the bond, it was objected that the other obligor named in the bond, is alive and not sued. *Per curiam*, the Defendant ought to have pleaded that in abatement, if he supposed it would have been of any advantage to him; for by pleading over to the action, he has admitted himself to be a lawful Defendant. Wherever a plea is pleaded, which according to the order of pleading, is subsequent to another which might have been of advantage had it been pleaded at the proper time, he thereby waives the matter that was proper to be exhibited in that former plea, otherwise, there would be the greatest confusion in trials at law. The Plaintiff would constantly be turned round upon objections he did not expect, and of course not prepared to combat. It would also be productive of a great waste of time, were the court and jury to take up every objection which might be made through every stage of the proceeding, and endeavor to ascertain its reality—the rules of pleading have been formed with great wisdom, and with a view to the prevention of these mischiefs, and if observed the parties will never suffer injustice, at the same time that the weight of the whole cause will be reduced to one or two points, of which both parties are apprized by the pleadings. This objection therefore cannot be taken upon these issues. *Gilb. Law Evid. 168. Co. Litt. 283 a.—1 Rep. 119.* Also, this objection is not good for another reason. 1789, c. 57, directs that in all cases of joint obligations or assumptions of co-partners or others, entered into after the passing of that act, might be sued upon in the same manner as if they were joint and several, and

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Apr. 1795. this is a joint obligation entered into after the passing of that act. The Plaintiff had a verdict and judgment.

NOTE. Upon the first point see 1 *Saund.* 291, notes. As to the other point see note to *Brown, Campbell & Co. v. Clary & Craig, Admr's.* ante 107.

John Winslow v. Lewis Bloom.

In an action of covenant for a certain sum in silver or Spanish milled dollars, the jury are at liberty to give the real value in our currency as damages, notwithstanding the act of 1783, *Rev. c.* 187.

Covenant—and covenants performed pleaded. The covenant was for the payment of four hundred and fifty-two dollars (silver or Spanish milled) on or before the first of April, 1794. Evidence was offered of the value of these dollars, when exchanged into current money of this State. This was strongly objected to, on the other side, who insisted that the value of Spanish dollars was already settled by 1783, *c.* 4, *s.* 2. *Per curiam*, the evidence is proper, and ought to be received. This is an action of covenant—the jury are at liberty to give such damages as will do complete justice between the parties.

NOTE.—The act of 1783 declares at what rate the foreign coins there mentioned, shall be estimated in our currency—a currency at that time only imaginary; we had no circulating medium of any kind: since that time a paper money hath been emitted, which also refers as to its value to this imaginary currency, the value of which is fixed, but only ascertainable by a comparison with the coined money of other nations. Our bills of credit, when issued, were intended to be a perfect representation of the value of this imagined currency; that is to say, eight shillings of these bills was intended to represent eight shillings of our currency, which by law was equal to one Spanish dollar; but these bills of credit, contrary to the expectation of the Legislature, depreciated immediately, and failed to answer the purpose expected from them—eight shillings of these bills did not in fact represent eight shillings of our currency. The Legislature however built upon the expectation, that these bills of credit would completely represent the same sum in our currency as they were issued for, and in that belief directed it to be a tender in payment of debts—thus far the law is positive, and must be obeyed; and therefore if on the day of payment, the obligor or debtor will tender, twenty shillings for instance of these bills, in discharge of a real debt of twenty shillings in the currency of North-Carolina, or two and a half dollars, the creditor must either receive it, if the tender be made with all proper circumstances, or forego his interests and costs. This is an injustice which results from the positive directions of the act, though it was not foreseen at the time when the act passed—but there is no part of the act that says the court in giving judgment may not take notice

of the depreciation, and that the judgment is to be discharged in a Apr. 1795. currency degraded below its intended value—neither is there any law which says, the court shall not increase the quantum of this degraded currency in the judgment they give, till it becomes equal to that value which is represented by those four hundred and fifty-two dollars. And where the court is not tied down by the express and positive directions of the Legislature, the presumption is, that the Legislature intended they should act so as to attain the real justice of the case before them. The true meaning of the act was, that one Spanish milled dollar should not be deemed to be of greater value than eight shillings of our currency as estimated when and before the act passed; not that it shall be equal to eight shillings of paper money afterwards to be issued, and which would depreciate below its intended value. The many disputes that have arisen relative to the paper money now circulating, seem to have originated from part of an act of the same session, declaring twenty shillings of this money to be equal to two and an half Spanish dollars, and that it should be a tender after that rate—hence it hath been inferred, that as twenty shillings of this money, is equal to two and an half dollars, and these equal to twenty shillings of the currency of North-Carolina, as estimated at and before the session of 1783, that therefore each of them is equal to the other; and that is mathematically true, yet if two things are only equal to a third in some respects, and not in others, it cannot be affirmed that they are equal generally. 20s. of the currency of North Carolina, were it in silver, coined by authority, would be a tender in discharge of a debt of $2 \frac{1}{2}$ Spanish dollars, and as a bill of 20s. of the paper money now circulating, would also be a tender in discharge of $2 \frac{1}{2}$ Spanish dollars—it follows, that as to the purposes of a tender they are equal, and have equal effects and consequences; but if we speak of value as applied to the assessment of damages, the case is far otherwise. One Spanish dollar is represented by 10s. of our paper money, and this dollar by 1783, c. 4, represents 8s. of our currency as estimated at and before that session, and consequently was what was referred to by that act; and then apply the rule above-mentioned, and it will make both the dollar and eight shillings of our currency, equal to ten shillings of the paper money; and thus the law of 1783 has no influence upon the subject of assessing damage by a jury. It only operates in the case expressly pointed out by the act, where the debtor has made a tender; and then is only operative where the tender is made and pleaded, *his omnibus concurrentibus que in jure requiruntur*. As therefore the court and jury are not tied down by the act to any positive rule with respect to the assessment of damages, they should always be careful that the creditor shall have so much of the paper money as represents the real value of the contract sued upon. This answers the true meaning of the Legislature, which in former instances being misunderstood, hath exposed them to the imputation of enticing the citizens to the discharge of their debts with a less value than they engaged to pay; than which nothing was ever more untrue, nor any imputation more unmerited.

NOTE.—Vide Anonymous, post 354.

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Parker v. Stephens.

When an executor omits to plead "no assets," it is an admission of assets which he can never afterwards controvert: and in such case, the proper judgment is, that the principal sum recovered be levied *de bonis testatoris* in the hands of the executor, and the costs *de bonis propriis*: and upon the return of the Sheriff that there are no goods of the deceased in the hands of the executor, then a *sci. fa.* issues to the executor to shew cause why the execution for the principal should not be levied *de bonis propriis*.

Vide post
298.

- The Plaintiff had brought an action against the Defendant, as administrator of *Charles Stephens*, deceased: to which the Defendant appeared and pleaded the general issue, act of limitations, a former recovery, and set off.
- (219) All which pleas were found against him, and damages assessed to ninety pounds four shillings, and costs to sixpence: and there was a judgment against him, to be levied *de bonis testatoris*; a *fi. fa.* issued, and the Sheriff returned thereupon, that there was not any property of the intestate's to be found—and upon this return, the Plaintiff took out a *sci. fa.* for the Defendant, to show cause why the Plaintiff should not have judgment to be levied *de bonis propriis*. This cause now came on to be argued: it was argued on the part of the Defendant, that this *sci. fa.* is irregular and improper, for that the first judgment should have been *de bonis testatoris si, et si non de bonis propriis*, and that not being so, it was erroneous; and that the court would not now help the Plaintiff in this hard case, where the attempt is to subject the Defendant's goods merely for his misleading, or for his ignorance of the rules of pleading, when perhaps the fact may be, that he hath not any of the goods of the intestate in his possession nor ever had.

Per curiam: We must not depart from the settled rules of law to avoid an inconvenience in a particular case.—It is better for the individual to suffer that inconvenience, than that the public should suffer a general mischief, by having the rules of law rendered arbitrary and uncertain. The rule of law is well known, that an omission on the part of the executor or administrator, to plead want of assets, is a confession of them, so that he can never afterwards be permitted to say he had no assets to satisfy that demand. The proper judgment in such case, is, to be levied *de bonis testatoris*; for the law will not presume

there are no assets, when admitted by the executor that there are, until it shall appear upon the return of the officer. *Godd. 199, sec. 7 and 8.* The costs of the first judgment are to be levied *de bonis propriis*, because, having assets of the deceased in his hands, he ought therewith to have satisfied the debt, and not have incurred the costs of a suit; which as they must necessarily be paid by some one, now the suit has been commenced, are justly charged upon him who hath occasioned them, and not on the estate of the intestate: and therefore in such case the true method of entering the judgment is this, the principal to be levied *de bonis testatoris*, and the costs amounting to so much, to be levied *de bonis propriis*. And, the judgment to have execution *de bonis propriis* for the principal, is always a subsequent judgment, founded upon the *sci. fa.* This judgment was therefore well entered, and this *sci. fa.* well brought upon the return the Sheriff hath made, and the Plaintiff must have judgment according to the *sci. fa.*—And he had judgment accordingly. *Vide Office Exec. 165 to 172.* (220)

NOTE.—In several cases like the present, after the return of a *nulla bona* by the Sheriff, the court permitted a special *fi. fa.* to issue (*Hogg's Ex'rs. v. White's Adm'rs. post 298. Burnside v. Greenside, 2 Hay. 112. Alston v. Harris's Ex'rs. Ibid 125.*) but the case of *Hunter v. Hunter's Adm'rs. N. C. Term Rep. 122*, decides that the special *fi. fa.* is improper, and that a *sci. fa.* or debt for a *devastavit* is the only proper course. See *1 Saund. 219, note 8. Toller's Law of Ex'rs. 469.*

James Ritchie v. Duncan McAuslin.

Administration granted when the next of kin are out of the country should be *durante absentia*: if otherwise it is erroneous. The next of kin in another country may appoint a person to take the administration here. The court should not grant letters to a person not designated in the act, before the persons designated have refused. The Superior Court will repeal the letters when improperly granted, and make an *order* for the County Court to grant them to the proper person. *Quere* whether it should not have been a *mandamus*.

Petition, to rescind letters of administration, granted by the County Court of Cumberland to the Defendant, of the estate and effects of *Auley McNaughton*, deceased, in July Term, 1792. The next of kin beyond sea, since that time, have appointed the petitioner to apply for the administration as their agent and trustee. He exhibited this petition to the county court, who refused to repeal the former letters; and thereupon the petitioner appealed to this court. He had a similar appointment also from

Apr. 1795. *Willie Erwin McClay*, trustee of the sequestrated estate of the surviving partners of *Auley McNaughton and Co.* in Scotland.

Per curiam, Administration when granted, if the next of kin are infants, should be granted *durante minoritate*; if beyond sea, or out of the country, *durante absentia*; and if otherwise granted, it is erroneous. Where the next of kin reside in a foreign country, and cannot personally attend to take the administration themselves, they may appoint a person in whom they have confidence to take it for them; and the court ought to grant the administration to their appointee. The court have not executed the power the law gives them, when they have granted letters to a person not designated in that act, before the persons designated have refused: but only where they have granted letters to the proper persons: when they have granted letters to improper persons, they may repeal them, and ought to do so, at the application of the persons properly entitled. 1 *Cro.* 469. 6 *Rep.* 18.—The consequence is, that the letters in the present case, having been improperly granted to the Defendant, to the prejudice of the next of kin in Europe, should be repealed, and granted to their appointee. *H. Bl. Rep.* 152.—This was ordered accordingly, and an order of this court was made for the County court to grant letters accordingly.

Quære, if it should not have been a *mandamus*—for if they refuse to comply with this order, how are they to be brought under the penalty of a contempt committed towards this court.

(221) The court further said, that they did not regard the appointment of the trustee of the sequestrated estate of the survivors, because the survivors were entitled to all the joint stock in trade, until the net balance was ascertained; and as to that, the power of the administrator commenced, after the business of the survivors was finished; and besides the administration would extend to such of the effects of the deceased, as were not a part of the joint stock, and the survivors could have nothing to do with that, and the trustee stands only in their place.

NOTE.—*Vide Carthey v. Webb*, 1 *Car. Law. Rep.* 247. *S. C.* 2 *Murph.* 268.

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Ingram v. Lanier.

Where a person concerned in interest is stated in the bill to be moved away and not since heard of for many years, so that he cannot be served with process, that shall be a good reason as between third persons for not making him a party; and the court will proceed to a hearing notwithstanding. When the court feels any doubt about deciding upon a plea, it can overrule it, and suffer the Defendant to insist upon the same in his answer.

This was a petition under the act of 1762, c. 5, s. 23, stating that the petitioner is the brother of *Peter Lewis*, deceased, who died possessed of an estate, leaving a wife, who had moved away and had not been since heard of, so as to be served with process: that he was the only next of kin of the deceased; that *Lanier* had procured letters of administration upon the personal estate of the deceased, and had possessed himself thereof, and would not account for the same, and deliver it or his share thereof to the petitioner.

There was a demurrer to this petition, for that the wife of the deceased was entitled to a moiety of the personal estate, and was not made a party: there was also a plea that seven years had elapsed since the death of the intestate, whereby the church wardens became entitled under the act of 1715, c. 48, s. 9.

Per curiam, after hearing the argument, as to the first point, when a person concerned in interest, is stated in the bill to be removed to a foreign country, or to be moved away and not since heard of after many years, so that he cannot be served with process, that shall be a good reason as between third persons for not making him a party, and the court will proceed to a hearing notwithstanding. Here, that is stated in the petition as a reason for not making her a party. 2 *Atk.* 510.

As to the other matter, the old law is altered by the act of 1784, c. 23, by which all the estate of the deceased, not claimed, is to be deposited in the treasury, subject to the claim of creditors, and the lawful representative of such decedent. However as seven years may have expired before the passing of this latter act, in which case it may be doubted whether the first or latter law is to govern this case—let the demurrer and plea be overruled, and the Defendant be at liberty to insist upon the limitation of time in his answer.

Apr. 1795.

State v. ———

The Court cannot order the State to pay costs as a condition of getting a continuance, nor indeed, it seems, in any case.

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There were several actions of detinue that had been appointed to be tried on this day, Friday, the 30th of April. A motion was made on behalf of the State, for a continuance of them all, upon the ground that since the commencement of the present term, and never before, it had been discovered there was a piece of testimony extremely material, which might be procured by the next term—and upon this ground, the court were of opinion the causes should be continued—but they said, if it were in their power to order it, the State should pay costs agreeably to the act of 1779, c. 4, s. 5.—Whereupon, Mr. Moore insisted, that during the whole of this term, where the party moving for a continuance had been guilty of any the least neglect, though it might not be so great as to overturn his excuse for not being ready, the payment of the costs of the term had been made a condition of his obtaining the continuance, and there could be no good reason why the State should receive more favor or indulgence than an individual, since justice was the only object of the court. If it was just to compel an individual under certain circumstances to pay costs, it was equally just, that the State, under the same or the like circumstances, should also, be compelled to pay costs: and as for the doubt of the court that they could not pass an order to compel the State, he would observe, that in the case of the *State v. Tatom*, determined at Hillsborough, on the last circuit, the court allowed a set off in favor of the Defendant, which is in lieu of an action against the State; and he trusted if an order was made, purporting it to be the opinion of the court that the State ought to pay costs, that there was magnanimity and justice enough in the sovereign legislative body of the country, to do voluntarily what justice required.

Per Curiam, we cannot pass any effectual order or judgment against the State—neither is there any instance of a court saying to a sovereign body, they ought to do thus or thus: for us to pass an order without any precedent, and which it would be optional in them upon whom it was intended to operate, either to comply with

or not, would be to place ourselves in a ridiculous point of view. We have no power to make such an order. *Et per* one of the Judges—I was surprized at the adjudication at Hillsborough, which has been cited at the bar, when it took place. I argued that cause on the part of the State, and I could recollect no case like it that I ever had read or heard of. I have thought much of it since, and looked much into the authorities. The practice of set-offs is founded upon a statute, and were it not for that, a set-off could not be allowable; it therefore can extend no further than the true spirit of the act will admit—that was to diminish the number of law suits and expence to the parties. It intended, where two parties had reciprocal demands, that the Defendant instead of suing, might plead his demand of equal or greater value in bar; if of less value, might set it off upon notice given. By this means he had justice more easily done, and at much less expence than when both parties were to sue reciprocally. *Paynter v. Walker. C. B. Easter 4.—Geo. III. Buller 179. 1 Wils. 155. Cowp. 133, 135.* It follows from hence, that a Defendant cannot set off, but in a case where he might sue the Plaintiff if he thought proper. This was certainly the true meaning of the act of 1756, c. 4, s. 7, and as the case cited was brought on suddenly, on a motion on the part of the State for judgment, and determined suddenly, without time taken to consider, and as it was against the current of authorities, it was improper perhaps to cite it as a precedent, before it should be corroborated by some concurrent decision, or by some case adjudged upon consideration.—One of the reasons given for the decision in that case was, that the Defendant could not sue the State; and that was the strongest reason that could be offered, to prove he should be allowed to set off his demand. The circumstance of the practice of set-offs being introduced by, and being dependant on an act of Assembly, was not at all attended to. But the practice was treated as an equitable practice founded on the common law, or in reason and propriety only: besides, it does not follow, that because the party cannot set off, he cannot obtain justice from the public—the Legislature will surely have magnanimity and justice enough to pay the party his just demand, upon a proper application. The case cited therefore is to be doubted of.

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Apr. 1795.

Den, on the demise of Wilcocks, v. ———

(224) There were several ejectment suits brought against the inhabitants of a part of the town of Fayetteville, for recovering the respective lots of land on which they were respectively settled; and the issue of the contest depended solely upon the ascertainment of an old line of a tract of land of one thousand acres which lay adjoining to the town, the Plaintiff alleging that these lots were within that line, and the Defendants that they were without.— A surveyor and jury were appointed to survey and view the land—and the order for a survey and jury was made in each of the causes; and at this term, the survey being not completed on the day on which the causes were called for trial, a continuance was moved for on the part of the Defendants, and granted upon the terms of their paying the costs of this term, according to the act of 1779, c. 4, s. 5, whereupon it became a question whether each Defendant should pay the whole of the expenses of the jury and surveyor, or whether the jury and surveyor should be allowed as for one cause only. It being alleged, that although there were several cases depending upon the ascertainment of this line, yet the surveyor and jury had but the same trouble and labor as if there was only one cause; and that one running of the line of the one thousand acre tract, answered for all. The court took time to advise until Judge MACAY could search the record at Salisbury in the suit of *Pacely* and others, where the same question had been decided.

NOTE.—It seems as if each Defendant, in case a verdict went against him, should pay the whole costs of the surveyor. The line must be platted for each, in the survey returned for his cause; also, each Defendant's lot must be viewed and platted to shew its situation relative to the long line. With respect to the jurors, their labour is over when the lines are once run and viewed. When they are viewing the long line, that is a service for the Defendants jointly; but when they are viewing the lots, that is for each Defendant singly; and if they take up several days in doing this, the lots first viewed and passed by, should not contribute to the expenses of the lots not yet viewed—as to that part of the service therefore, it seems, as if each Defendant ought to pay. We must wait however for a decision on this point to be ascertained of the law.

NOTE.—*Vide S. C. post 484.*

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HALIFAX, APRIL TERM, 1795.

Swepson v. Whitaker.

An action will not lie against the Sheriff for an escape upon mesne process: he ought to be proceeded against as bail, under the act of 1777, *Rev. c. 115, s. 16 and 69.*

This was an action for an escape upon mesne process. The Defendant was the Sheriff, and *Linton*, the Defendant in a former action at the suit of *Swepson*, was surrendered in court by his bail, and committed, as the Plaintiff alleged, to the Sheriff, the present Defendant.—There was no record of this commitment, and it was objected it could be proven no other way, the surrender having been made in court. It was also objected, that though an action for an escape on mesne process will lie in England, it will not in this State. By the act of 1777, *c. 2, s. 16 and 76*, the Sheriff arresting, is deemed to be the bail himself, where he does not return bail; and by *s. 20*, upon a surrender made by the bail, the Sheriff is to receive the body and hold the Defendant in custody, as if bail had never been given; now, if bail had never been given, the Sheriff might have discharged the Defendant without bail, and thereby have become bail himself, or he might have committed him to prison. The circumstance of committing the Defendant to prison, cannot place the Sheriff in any worse situation than he was in, after having him in custody and before actually committing him—the Defendant is his prisoner as well in the one case as in the other; if therefore, his discharging the prisoner out of his custody before an actual imprisonment, will only make the Sheriff liable as bail, by parity of reason, his discharging the Defendant from an actual imprisonment will have the same operation: the Plaintiff in the action is not more injured in the one case than in the other—for if the Sheriff is held to be the bail in both cases, then, the Defendant is in the power of the court, and the Plaintiff may proceed in the action—then if the Sheriff be bail as well in the one case as in the other, he ought not to be liable to an action for an escape on mesne process, because in this action the Sheriff can only discharge himself, by a recaption before the action brought against him; whereas, if he be proceeded against

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Sep. 1795 as bail by a *sci. fa.* he may, by s. 20, retake his prisoner, and surrender him to the court in discharge of himself, at any time before final judgment against him—and in fact the Defendant in the present case did retake Linton and put him in prison, and had him in court to answer the Plaintiff's action, if he would have proceeded against him.

Per curiam, ASHE and WILLIAMS—Upon the last point, we are of opinion, that the action for an escape upon mesne process, will not lie against the Sheriff, in this case; he ought to be proceeded against, as bail—to proceed against him in this manner, is to deprive him of many advantages. And, there was judgment for the Defendant.—*Ex relatione.*

NOTE.—But if the Sheriff, to a writ of *capias ad respondendum*, returns an escape, this negatives the supposition of his having come bail, and an action for the escape will lie. *Tuton v Sheriff of Wake.* post 485. Indeed in such case, it seems the only proper remedy.—*Hart v. Lanier*, 3 *Hawks*, 244.

NEWBERN, SEPTEMBER TERM, 1795.

Cleary v. Coor and Hawks.

An entry "referred to A, B & C," means a general reference of the cause, and not merely to audit and state the accounts. The award of arbitrators ought not to be set aside, unless in case where their decision is plainly and grossly against law; not where the point decided might be doubtful.

This was a suit in Equity, to which the Defendant pleaded; and afterwards there was an entry in these words, "Referred to A, B & C." Upon this the referees met, and returned an award—exceptions were filed on the part of the Plaintiff: and at the last term a rule to shew cause, why the award should not be confirmed was entered on the record. And now at this term, *Davie* for the Plaintiff, insisted the referees were not appointed to act as arbitrators, but to state the account; and that they had mistaken their powers. *Per curiam*, if the intent had been to refer to them to audit and state the accounts, it would have been so mentioned, especially as there was a Master whose business it was to make such statement: neither would the court have ordered an ac-

count to be taken, before the pleas were argued or put to issue, and tried. Indeed by the last entry, this seems to have been considered as an award by the counsel on both sides, who have mentioned it as an award. *Davie* then insisted, that this award ought to be set aside being against law; for that the arbitrators had allowed *Coor* a considerable sum for his services as an administrator (this was admitted by *Coor*, now present in court, that is to say, he admitted they allowed ten *per cent.* in the year 1779, upon the value of the goods in 1776, which came to about an half *per cent.* or ten shillings on the real value) and he cited *Bl. Rep.* 363. 3 *Atk.* 494.

The court took time to consider, and having had before them, 1 *Atk.* 64. *Jacob, Verbo Arbitrators.* 2 *Brown* 701. 1 *Brown* 271. 1 *Stra.* 301. *Salk.* 71, pl. 4—83, pl. 1, they next morning decided, that the award of arbitrators ought not to be set aside, unless in cases where their decision is plainly and grossly against law—not where the point decided might be doubtful. In the present case, although no such allowance ought to be made by the strict rules of law, that is a point not universally known and clear; but the contrary is practised in almost all the County Courts in this State, that is to say, the County Courts generally make such allowances. Let the award be confirmed.

NOTE.—*Vide Jones v. Frazier*, 1 *Hawks* 379.

Anonymous.

The action of account will not lie for a legatee against an executor, or the executor of such executor.

Account. The jury had found a verdict for the Plaintiff, subject to the opinion of the court, upon the question whether this action will lie against the executor of one, who as executor took the goods of the testator into his possession, and hired out the negroes, &c. This suit was commenced by one of several legatees. In the argument of this case, were cited 3 *Bl.Com.* 164. *Reeves's Eng. Law* 391. 2 *Reeves* 168, 169. 3 *Dyer* 277. *Per curiam*, this action will not lie in the present case. The writ of account lieth against a man as guardian, bailiff or receiver; and by statute, against the executors of such; but it lieth not against an executor who makes a profit of the estate of the deceased, nor against his executor—

Sep. 1795. for the law hath provided other means to call an executor to account, where all the legatees must join in one suit, and not each one of them harrass the executor with a separate suit. There is not any authority to shew, (227) that an executor was ever charged in account as guardian; whatever he recovers is assets for the whole estate, and not the particular property of any special legatee. There is no privity between the legatee and executor, which is essentially necessary to the support of this action. *Co. Litt.* 172. The executor does not act by the appointment or choice of the legatee, as is the case with the guardian; but by the appointment of the testator; though the guardian shall have an allowance of all his reasonable costs and expences. *Co. Litt.* 89. And so it may be thought no inconvenience to the executor to be charged that way, it is convenient in this, that he is chargeable thereby by each legatee; whereas in the modes anciently prescribed in the cases of executors, they must all join. It would not only be a perversion of terms, but a great wrong to the executor to charge him as bailiff, who is liable to account not only for the profits he actually made, but for all such as he might have made by industry and care; and as a receiver he ought not to be charged in this action, because the receiver is not to be allowed any expences or charges which an executor may be by 1715, c. 48, s. 7.—So there was judgment for the Defendant.

————v. Brown's Executors.

The indisposition of a witness, whose deposition has been taken *de bene esse* and was now offered to be read, cannot be proved by the oath of the party producing it.

The Plaintiff brought his action against the Defendant, for a sum of money which he alleged he lent to *Brown*, in his lifetime, when going to the Convention and Assembly in 1789. The Defendant produced very strong circumstances to show, that the instrument purporting to be signed by *Brown*, in acknowledgment of the receipt of this money, was forged. In order to rebut this testimony, the Plaintiff moved to read the deposition of a woman, who had lived at the house of the Plaintiff about the time when this money was said to be lent, and who as it was alleged, heard *Brown's* acknowledgment of the debt—

this deposition had been taken *de bene esse*, and General *Davie* for the Plaintiff, offered to prove the present indisposition of the woman, by the oath, of the Plaintiff; and said, that had always been the practice. But, per HAYWOOD, Justice, who gave the opinion of the court— I cannot say, because I do not remember how the practice hath been, but surely upon principle, so material a fact as the indisposition of the witness, upon which depends the reading the deposition, and perhaps upon that, the fate of the cause, should be proven by some other person than the Plaintiff, who may be greatly interested in having the deposition read, rather than the witness examined and cross examined in court. That the indisposition or death of the witness, is to be proven by others, is strongly implied in the words used in the case of *Fry and Wood*. 1 Atk. 445, and in 1 Mo. 282, 283, the falling sick of the witness was proved by an indifferent person. In the present case, there was no one in court who could prove the indisposition of the witness, and the deposition was rejected—though it was afterwards read by consent of parties.

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NOTE.—Vide *Anonymous*, 2 Hay. 74.

Abner Nash v. Administrators of Abner Nash.

A devise to the Plaintiff of cash sufficient in the opinion of the executors not exceeding £1000 to purchase a tract of land; in a following clause, the following devise, "I give to my wife all the negroes I obtained in marriage with her, and their increase, also one-third of stock, &c. and the residue, I give to my children by my present wife." The estate is exhausted except the negroes, contained in the residuary clause to the wife and children, and debts to a large amount remain unpaid. Plaintiff claims his £1000. Decided that the Plaintiff's legacy is general, but still entitled to be paid out of the residuary part devised to the wife and children, which, as a residuum can never be specific:—that the children's part is to be first applied, as the wife's part, though general and residuary as to the Plaintiff, is specific, in reference to theirs:—that as the testator, in mentioning the sum of £1000 for the Plaintiff, contemplated a full enjoyment by the legatees of their respective legacies of slaves; therefore, under the discretionary power given to the executors of fixing the amount to be paid to the Plaintiff, his legacy shall be abated from £1000 in proportion to the value of the negroes that shall be required to pay the debts.

In this case, there was a devise to the Plaintiff, amongst other things, of cash sufficient in the opinion of the executors, not exceeding one thousand pounds, to purchase a tract of land on Tar river. In a subsequent clause,

Sep. 1795. after giving several legacies to his children by his first wife, he says, all the rest of my estate, I give and bequeath as follows: "I give and bequeath to my beloved wife, all the negroes I obtained by marriage with her, and their increase; also one-third of all my plantation stock, household and kitchen furniture. And the residue I give and bequeath to my children by my present wife," &c. &c. The whole of the estate, except a part of the furniture, and the negroes comprehended in the residue to the wife and younger children, is exhausted; and there yet remains debts to be paid, to the amount of four thousand pounds and upwards. The Plaintiff claims his thousand pounds legacy. This case was now argued by *Taylor* for the Plaintiff, and *Davie* for the Defendant—their arguments are shortly adverted to and stated in the following opinion. After the argument, the court, composed of *WILLIAMS* and *HAYWOOD*, took time to advise, saying the judgment of the court, when they had formed their opinion, should be entered as of this term—however the judgment was not entered till the next term. At which time, by the consent of the attorneys on both sides, it was entered according to the opinion of Judge *HAYWOOD*—Judge *STONE* assenting.

(229) Judge *HAYWOOD*—This legacy to the Plaintiff, is a money legacy, notwithstanding 1 *P. Wil.* 127, for being a bequest of money, if it be not a specific legacy, it must of consequence stand in the rank of a pecuniary one. A legacy of money is specific only in such cases where the money is identified and distinguished from all other money; as money in such a bag, or in such a bond, or to be paid out of such a security, or in such hands. 1 *Atk.* 508. But it is not a lost legacy, as contended for by the Defendant's counsel; for it is not made payable out of any particular fund. Had it been, and the fund had failed, it would have been lost as he contended. 2 *Brown Chan.* 125. Here, it is not said out of what part of the estate it shall be paid, and of course by the rule of law, must be paid out of the residuary part. 2 *Ves.* 563. 1 *Atk.* 414, 418. 1 *P. Wil.* 404.

The residue mentioned in this will, is argued to be specific; as negroes are the subject of it, and they will pass by the assent of the executor. 1 *P. Wil.* 540.—Where the legacy is specific, it will pass by the assent of the executor; but every legacy which will pass by

the assent of the executor, is not therefore specific. The residue to *Mrs. Nash* in this case was of negroes; but it is not specific—there is no case in the books where a residuum hath been held to be a specific legacy—a residuum is the gleanings of an estate remaining after debts and legacies paid. 2 *Bl. Com.* 514. 1 *Atk.* 418. 3 *P. Wil.* 385. 2 *Ves.* 563. 1 *P. Wil.* 404. In each of these cases, it is admitted on all hands, that if the legacy was specific, it was lost; but if a legacy of quantity only, it was to be made good out of the residuum. The rest of my estate cannot, in the nature of things, be a specific legacy, exempted from any dependence on the other legacies preceding it. It is a relative term—its quantity, and even its existence, depends entirely upon the previous raising of the particular legacies. There can be no residue, if there be not estate enough to discharge the particular legacies to which it relates. Its quantity must depend upon the quantity of the particular legacies to be raised out of the testator's estate. It diminishes or increases in proportion to the largeness or smallness of the particular legacies which must first be taken from the net estate; and the question about contribution never arises, but where what was to form the residuum is exhausted. 2 *Ves.* 562. Whilst there remains any of the estate which forms the residuum, it is liable to be resorted to by the particular legatees, unless their legacies are specific, or out of a particular fund. It is argued by the Defendant's counsel, that as this legacy claimed by the Plaintiff, is a pecuniary one, and the residue specific, that the residue shall not come into contribution with it. It is said on the other side, that this legacy claimed by the Plaintiff is a specific one; because to be laid out in land; and that money to be laid out in land, shall be taken as land; and that a devise of land is specific. It is so—but the argument is fallacious. It proceeds upon this rule of Equity, that what ought to have been done, is considered as being done. The rule is here misapplied, and the whole doctrine built upon it. This rule is never applied in a dispute between a residuary and particular legatee; but always between the heir, and personal representative of the particular legatee.—The heir claims the money, though not yet laid out in land, as land; and founds his Equity upon this, that the delay of the executor or trustee to lay it out in land, as

Sep. 1795. he ought to have done, shall neither prejudice him, nor benefit the personal representative. Here the court will say, what the executor ought to have done previous to the death of the legatee, shall be considered as having been done—by force of which fiction, the money will now go into the same hands, as the land to be purchased with it would have done; and thus no one will be injured by the delay of the trustee. The misapplication of this rule, caused the mistake in *P. Wil.* 127, noticed in 1 *P. Wil.* 539, and would occasion the same mistake now, were it not attended to. This is the only point established by the cases cited for the Plaintiff, viz: 1 *P. Wil.* 127. 1 *Vern.* 52, 471. 2 *Vern.* 536, 583, 679. 1 *P. Wil.* 172. 3 *Atk.* 254. 3 *P. Wil.* 212, but there is no dispute in the present case, between the heirs and personal representatives of the legatee, and therefore all those authorities are to be laid out of the case.

But if it were not the rule of law, that the residuum were to be diminished by the particular legacies, in proportion to their amount, there is enough in this will to show it to have been the testator's intention, that the debts at least should be paid out of the residuary part; and then it will follow, that the particular legacies are not to be affected by the debts. After giving all the residue of his estate to his younger children, he gives power to his executors to sell any part of the land included in this residuum when they shall see occasion; and he adds in the next sentence, that they shall collect and pay his debts as fast as possible; and pay the surplus of the monies into his wife's hands for the benefit of his said younger children. His debts were in his contemplation when he directed this sale of the lands, and it was also in his contemplation, that a considerable part of the monies to be raised by these sales, was to be exhausted by his executors; and the surplus to go to his younger children whose lands were thus to be sold if necessary in the opinion of the executors. It seems evident therefore, he contemplated the payment of his debts out of the property comprehended in this residue to his younger children. It is true, he seemed to suppose the lands would be fully sufficient for this purpose; but it is equally true, he supposed his particular legacies would not be liable to those debts, and then, the rule of law more strongly applies.—

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It is the strong bent of my inclination to make this legacy contribute, because the testator supposed his negro part of the residuum at least, would be left for his wife and younger children, and possibly a surplus out of his lands to be sold. He did not foresee the great deficiency that would happen, and that it would become necessary to fall upon the negroes intended for his younger children; but yet I cannot persuade myself to depart from a rule of law so well established, and say, that these negroes being a part of the residuum, shall only abate in proportion with the particular legatees. Sep. 1795.

It is argued, that although this be a specific legacy, the residuary legatees are not bound to contribute; because these legacies are of a different species of property, namely of negroes, and of money; and where there are two specific legatees of two different subjects, the one shall not contribute to make good the other. 2 Ves. 563. I take the law to be thus, where specific legacies are given to several persons, of several parcels of a particular subject; and that subject fails in quantity to supply all, there each legatee must abate in proportion; when at the same time, other specific legatees of a different subject, shall not contribute at all, or be at all affected by the deficiency. For in such case who shall say, which one of the legatees shall be totally disappointed? And yet one, or more, must be totally disappointed, unless an abatement should take place; but when all the legacies, which were pecuniary, or unspecific legacies, are exhausted in the payment of debts; and there still remain debts to be paid, then all the specific legacies shall abate in proportion—For who shall say, which of these specific legatees shall be disappointed of his legacy? They are all equally objects of the testator's bounty. 1 P. Wil. 404. 3 Bac. Ab. 483. In the present case, there is no dispute between specific legatees of the same subject, insufficient for the payment of all, nor yet between specific legatees, where all other parts of the estate are exhausted—there yet remains a large residuum. 1 P. Wil. 404. But the truth is, neither of these legacies are specific; neither the Plaintiff's, nor that of the residuary legatee; and therefore this argument is without foundation.

It follows then, that the administrator *de bonis non*, must pay the legacy claimed by the Plaintiff, out of the residue bequeathed to the younger children; and if that

Sep. 1795. is not sufficient, then out of that part of the residue bequeathed to *Mrs. Nash*—for her legacy, though general and residuary as to the first children, is particular in respect of the younger children.

The only question then remaining is, what shall the Plaintiff recover? The testator after bequeathing a number of negroes to the Plaintiff, particularly naming them, adds, "and cash sufficient in the opinion of my executors hereafter to be named, not exceeding one thousand pounds, to purchase a tract of land on Tar river." The quantity of money is left uncertain, and the extent and quality of the land also. It is argued by the counsel, that this was left in the discretion of the executors; that they might be at liberty to judge of the price of the tract to be purchased, from the circumstances in which they might afterwards find the estate; and that as the executors were to have regulated their discretion by these circumstances, so will the court, now the matter is brought before them. No authorities were cited in support of this position, and there are but few to be found. There is one passage in *Swin.* 496, and another in *God.* 424, s. 16, which favor it. In the latter of these books, it is said from the civil law, that the ordinary shall moderate the sum, with respect to the testator's estate. In the former of them it is said, that if such an uncertain legacy be given for the performance of some act or other consideration, &c. &c. so much is understood to be disposed, as may satisfy or answer the purpose whereunto it is appointed; and as the ordinary, considering the necessity of the thing, and the ability of the testator, and the continuance of the gift, shall deem expedient. These books it must be admitted, are not of the best authority; they contain collections, taken partly from cases adjudged in our law, and partly from the civil law—yet as the rule laid down by them is so equitable in itself, and has not been contradicted by any adjudged case, it seems fit to be adopted in the present case, and then the court will regulate their discretion by a respect to what, in all probability, the testator supposed was the net estate he had provided for his younger children; which seems to have been the slave part of their residue, or in other words, he probably supposed the Plaintiff would have one thousand pounds, when they had the whole of the negroes comprehended in their residue. Upon this principle, the Plaintiff's legacy should be di-

minished in proportion to the diminution of their residuum; and for the purpose of ascertaining this, let the Master ascertain the value of all that part of their residue that yet remains unsold, except negroes, and deduct that value from the debts remaining unpaid—let him ascertain the value of the £1000 legacy, dollars being now estimated at ten shillings, and at twelve shillings when the will was made—let him then ascertain the value of the slaves contained in the residue, and what proportion the said legacy beareth to the value of the slaves; and deduct that proportion of the balance of debts, and also, the £250 paid in part by the Defendant, from the said legacy, and report the balance to this court. This report was made, and a decree made for the balance with interest.

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NOTE.—As to legacies, general or specific, see *Toller's Law of Executors*, 301. As to abatement of legacies, see *ibid.* 339. A residuary legatee may, by the particular words of the will, be a specific legatee instead of a general one. *Cook v. Oakly*, 1 P. Wil. 302.

Glasgow v. Flowers.

Where the law can give complete redress Equity will not interfere.—Equity cannot change established rules of law, nor act as a court of errors, to correct erroneous decisions of law. When slaves are given to one for life, remainder over, the increase born during the life interest, will go with the principal to the remainder man.

This was a bill in Equity, the object of which was to be relieved against a judgment given by the Superior Court at Hillsborough, during the last term, whereby *Flowers* the now Defendant, as the executor of *Flowers* deceased, had recovered two negroes of *Glasgow*, which were the descendants of a negro woman, given by the will of the deceased to his wife during her life; which two negroes had been born during the continuance of her estate. A title to these two negroes had been regularly deduced from the widow to *Glasgow*.

Per curiam—Where a case is so circumstanced that a Court of Law can give as complete redress as a Court of Equity can, a Court of Equity should not interfere with it—now the circumstances stated here, are such as are properly cognizable in a Court of Law, and with respect to which a Court of Law can give as complete redress to the party injured, as a Court of Equity could. The court decided in this case according to the case of *Timms* and *Potter*, which must now be taken and is taken, as a

Sep. 1795. decision establishing the rule of law on this subject. It is a very great mistake to suppose, a Court of Equity can decide against the rules of property established by judicial decisions. The Court of Equity is as much bound to observe them as a Court of Law is. If the decision was wrong the Court of Law might have granted a new trial: and if ever a court for correcting errors should be established, the wrong decision, if any there be, may be a subject for the jurisdiction of that court; but the Court of Equity must not undertake to act as a court for correcting erroneous judgments.—So the bill was dismissed for want of Equity.

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NOTE.—The case of *Timms and Potter*, so often cited in actions for the increase of slaves, was decided at Hillsborough three or four years after the war. It is a leading case, and governs a vast deal of the property of this country; and therefore it may not be improper to subjoin the substance of it in this place.

Glover gave a negro woman to his daughter, but reserved the use of the negro during his life. There was afterwards a judgment against *Glover*, and an execution, and the wench sold to satisfy it—*Potter* becoming the purchaser. *Timms*, the husband of the daughter, after the death of *Glover*, sued for the wench and her children. The Plaintiff had a verdict, and a special case was made as to the children born in the lifetime of *Glover*.

This special case was several times argued, the Defendant's counsel citing and relying upon the cases that decide the interest of money accruing during the particular estate, to belong to the owner for that time or *cestui que use*; and also 2 *Bl. Com.* 396. *Puff. lib.* 2, c. 4, p. 11.

After time taken to consider from one term to another, the court decided and gave their opinion at length—*SPENCER* and *ASHE* being only present, Judge *WILLIAMS* being absent, but of a different opinion.

They said the remainder carried with it the increase, and vested the property of the wench in the remainder man; and there was left in the owner for life, only the use and possession, which use entitled him to the labour of the wench and nothing more. The increase went to the remainder man, to compensate for the deterioration of the wench, by age, labour and breeding, whilst in the service of the owner for life. This rule, they said, had prevailed ever since the first settlement of the country. It had been constantly understood to be the law. The

practice of the country had been conformable to it. It was a convenient rule, as it enabled owners of such property more easily to provide for their families, in the distribution of it, and for these reasons it should not now be broken in upon. So there was judgment for the Plaintiffs, as to the children also. Sep. 1795.

Since this decision, when the case of *Glasgow and Flowers* occurred, the counsel for *Glasgow*, considering the principles of the English common law, with respect to the increase of animals that were the subjects of property; and also that this decision was made by two Judges only, against the opinion of a third, had intended again to bring this point in question, and he enquired diligently of the oldest practitioners he was acquainted with, whether there had ever been any judicial determination against that of *Timms and Potter*. The result was, that he could hear of no such decision; whence it is reasonable to conclude, there have not been any, and that the court in the case of *Timms and Potter*, were founded in saying that the rule had always been understood in this country from its first settlement, as they then decided it to be; and as certainty in the laws, is of much more consequence in general, than the modification of a rule, the opinion of the public in its favour for so great a length of time, is in such case, where the law is not clear to the contrary, a very good ground for deciding as the court did in the case of *Timms and Potter*; and as that decision adds an adjudged case to common opinion, it would be very imprudent for the Judges now to disturb it. It is indeed not certainly known, why this opinion was first entertained in this country, and adopted afterwards, since the rule with respect to all other animals is different even in this State; for if other animals be leased for years, and breed in the mean time, the lessee shall have the young as a part of the use. 2 *Nels. Ab.* 1104. *Godd.* 115. 3 *Ba. Ab.* 800. *Lev.* 42. *Allen* 139. 2 *Bulst.* 17. *Dyer* 56, a, 110, 212, b. *Bro. Leases* 23. The rule of the civil law is the same. 1 *Domat. lib.* 1, tit. 11, sec. 3. The property of the animals leased remains in the lesser, so that he may maintain an action if the lessee kill them. Upon principle therefore, it is not a sound action to say that because the property is in the remainder man, and the use only in the owner for life, that the increase necessarily must belong to the remain-

Sep. 1795. *der man.* It is a conclusion that by no means results from the premises. It is a conclusion that is not drawn from such premises in other countries, where slavery has been introduced. It is the settled law of Maryland, that negro children born of a mother given to A. for life, and after his death to B. in the lifetime of A. do belong to A. unless the increase are also given over by express words. *Vide Deputy Commissary Guide, published by Valette, p. 91.* That this is the law of Maryland is confirmed by the opinion of a lawyer of that State of the first eminence, taken on the occasion of this suit of *Glasgow and Flowers*, who says it is a rule of the greatest notoriety there, that the increase in the case above stated, belongs to the owner for life or usufructuary; and that the decisions in Maryland have been so uniformly to that effect, that the question would not now bear an argument there. It is of no real use to investigate the origin of the rule adopted and confirmed by the case of *Timms and Potter*, as such an investigation could only tend to gratify inquisitive and perhaps idle curiosity; but it would not be a matter of difficulty to trace its origin with some degree of probability. This country, though it began to be settled as early as the year 1668, it is to be presumed had not come under an established government, having courts for the regular and constant administration of the laws, till about the beginning of the present century. The first acts of the Legislature that appear in our statute book, were made in the latter part of the year 1715, though there are judicial records purporting to proceed upon acts passed in the year 1712. It is probable, and indeed it is a fact very generally admitted, that this country in its infancy, was for the most part settled by emigrants from Virginia, who, as all other emigrants do, brought with them the customs and legal notions of the country they left. Every one who has practised in North-Carolina, will be immediately satisfied with this observation, if he will but recollect how many legal notions, borrowed from the laws of Virginia, are yet current amongst the inhabitants of this country. The law of Virginia of the year 1705, made slaves in many respects real property, annexed them to the lands of the owners, thereby placing them in the condition of the ancient villains in England, who were *adscriptitiæ glebæ*, and went, as also did their posterity, to the absolute proprietor of the land. The

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act of 1705 expressly considered the increase as a part Oct. 1795.
 of the inheritance that belonged to the heir, and provided
 that the tenant in dower, or usufructuary owner, should
 not remove them out of the country. 1705, c. 23, s. 10.
Salk. 666, pl. 1. Hence, it is not improbable, arose the
 idea first entertained in this country, that the increase of
 slaves belonged to the absolute proprietor, exclusive of
 the claim of temporary owners or usufructuaries; and
 that idea, for want of examining its foundation, having
 once become general, the inhabitants of the country began
 to act under it, in making their contracts, wills and set-
 tlements as provisions for their families; and probably
 continued to do so, until at length, it became dangerous
 and fraught with mischievous and unjust consequences to
 attempt the establishment of a different rule, or the true (237)
 one—and the courts were necessitated, as they have been
 in some other instances, to permit common error to make
 the law. Thus, what at first was but a crude opinion,
 without any legal foundation, hath in process of time and
 by long usage, been adopted into the body of our laws,
 as a fixed and settled rule of property. This seems to be
 a more rational mode of accounting for the rule laid down
 in *Timms* and *Potter*, than that which seeks to support it
 upon principles of the common law—all of which, so far
 as they can be traced, or as they afford any deductions
 that can be rationally inferred from them, are certainly
 repugnant to the rule established in *Timms* and *Potter*.

NOTE.—Upon the subject of jurisdiction of Equity, see *Perkins v. Ballinger*, post 367. *Brickell & Green v. Jones*, 2 *Hay*. 357. *Fish v. Lane*, *Ibid.* 342. *Thorn & Wife v. Williams*, 1 *Car. Law Rep.* 362. *Long v. Merrill & Beard*, *N. C. Term Rep.* 112. *Littlejohn v. Patillo*, 2 *Hawks* 302. *Davidson v. Nelson*, *Ibid.* 113. *Peace v. Nailing*, 1 *Dev. Eq. Rep.* 289. The point relative to the increase of slaves belonging to the remainder man is fully sustained by the case of *Erwin & others v. Kilpatrick & others*, 3 *Hawks* 456.

EDENTON, OCTOBER TERM, 1795.

Den on the demise of Sandifer v. Foster.

The last line of a boundary was from a white oak, (which stood half a mile from the river) thence along the river to the beginning: held, that the river is the boundary.

Ejectment. The land in controversy was patented in the year 1706, by one *Gee*, and a transfer of two hundred

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acres of the tract was made to *Bridgers* by endorsement on the deed. In 1752, *Bridgers* conveyed to *Robert Sandifer*, who in 1765, devised to his son *Robert Sandifer*, after the death of the deviser's widow; but in the mean time, he gave the lands to her for her life. She is yet alive, and hath conveyed the lands to the Plaintiffs. In the year 1780, *John Sandifer* obtained a grant from the State, and conveyed to his son *Robert*, who conveyed to the Defendant a part of this land. *Gee's* patent began at the mouth of *Dividing run*, thence north, thence east, thence south to a white-oak, thence along the river to the beginning. This white-oak stood half a mile from the river; and if the line be run a direct course from thence to the beginning, a large part of the land described in the Plaintiff's grant, will be left out of *Gee's* patent; but if the river is deemed to be the boundary, the land described in the Defendant's grant will then be included in *Gee's* patent, and of course, be also included in *Bridger's* deed.

Per curiam, WILLIAMS and HAYWOOD, after argument—the river in this case, must be considered as the boundary of *Gee's* patent—it has always been thus uniformly decided in our courts.

The jury found accordingly, and there was judgment accordingly—*Baker* for Plaintiff, *Keys* for Defendant.

NOTE.—*Vide Hartsfield v. Westbrook*, post 258—note to *Bradford v. Hill*, ante 22.

(238) **Thomas Jones's Administrators v. Joseph Blount's Executors.**

When the subscribing witness to a bond is dead, and his handwriting cannot be proved, proof of the handwriting of the obligor may be received.

Debt upon a bond for five hundred and twenty-six pounds. The Defendant pleaded a set off, and produced two old bonds, one dated in 1760, the other in 1768, both attested; but the witness who attested one of them, was a lady who had lived some time ago in *Edenton*, and was now dead; and her handwriting could not be proved by any one that the Defendant could procure.

It was objected by *Mr. Hamilton* for the Plaintiff, that when the handwriting of a deceased witness cannot be proved, it is irregular to prove the handwriting of the ob-

ligor himself, that being not essential to the deed, and not amounting to any proof of the delivery of it. Oct. 1795.

Per curiam, WILLIAMS and HAYWOOD—The law only requires the best evidence the party has in his power.—The subscribing witness must be produced when there is one; if he be dead, proof of his handwriting may be admitted; and if the handwriting of the witness cannot be proven, then proof of the handwriting of the obligor may be received; this affording a strong evidence that the obligor meant to make himself chargeable by that signature. And the Defendant in the present case, was permitted to prove the handwriting of the obligor.

NOTE. Vide note to *Clements & Co. v. Eason & Wright*, ante 13.

Standen v. Bains.

General reputation is admissible as evidence in cases of boundary.—Marked lines and corners may be established as the true one, although variant from the courses and distances mentioned in the deed.

Trespass, *quare clausum fregit*. Not guilty, *liberum tenementum*, &c. pleaded. The Plaintiff claimed under Arkill, who patented a tract of land in the year 1740, extending, as he alleged, to a line distinguished in the plat, by the name of the dotted line. The courses and distances mentioned in the patent extended not so far; but only to a line distinguished in the plat by the name of the black line. The Defendant entered this intermediate tract in the year 1784, and took possession—whereupon, the Plaintiff brought his action. The court permitted evidence to be given, that the dotted line, which was a marked one, had for a long time since the year 1740 been reputed the line of Arkill's tract—the patent called for a gum standing in Robert's line; this gum was found at the termination of the dotted line. It next called for two lines of Roberts' tract, the dotted line was upon these two lines. It next called for Hoskin's corner: the dotted line went to that corner, and there was nothing to prove the black line to be the true one, but course and distance. (239) There was no witness who could prove positively, that the dotted line was the line of Arkill's tract.

Per curiam, the mistake of a surveyor in describing or laying down the boundaries of the land patented, should not prejudice the patentee, if the jury are satisfied that the marked line was the true one, although the distances

Oct. 1795. thereof will not correspond with the distances in the patent—therefore in the present case, the jury may consider whether there is sufficient evidence to satisfy them, that this dotted line was the real boundary, though not truly described in the patent; and if they think so, then to find for the Plaintiff. The court then recapitulated the circumstances above mentioned, as affording a proof of this being the true line, rather than the other, and the jury under their direction found for the Plaintiff.

NOTE.—*Vide* note to *Bradford v. Hill*, *ante* 22.

Ferguson v. Fitt.

When the vessel is lost, the goods that are saved are not liable to average—the master does not lose his wages by the loss of the vessel. These words, in a letter from a Defendant to the Plaintiff, “I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a law suit,” are sufficient to take the case out of the statute of limitations.

Case. For wages due to the Plaintiff as Master of a vessel, which he had navigated for the Defendant to St. Eustatia; and upon an account settled, and a special case made, stating in substance, that these services were performed in 1788, or beginning of 1789, and that the Defendant wrote to the Plaintiff within three years, saying, “he would rather come to a settlement, although he should allow the account as insisted on by the Plaintiff, than wait the event of a law suit;” and the doubt stated on this point was, whether the act of limitations barred the Plaintiff in this case. The special case further stated, that when the vessel left Eustatia, laden with rum and other articles, there were on board six puncheons of rum that belonged to the Plaintiff, and that the vessel was lost, after it had passed the bar, on the homeward bound voyage; and that these six hogsheads of rum, together with about twenty-two hogsheads of other rum, the property of the Defendant, were saved; and the whole including the six hogsheads, came to the Defendant’s possession; and the doubt stated for the opinion of the court, was, whether the six hogsheads of rum should be subject to an average loss or not; and whether, the vessel being lost, the Master was at all entitled to his wages.

Per curiam, (after several days taken to consider,) when a vessel is in danger of being lost, and part of the

goods on board are cast overboard to save the rest, and the vessel afterwards comes safe into port, the goods that are saved shall be subject to average; but if the vessel should not come safely into port, then average shall not take place; for the only reason of average is, because the goods preserved, were saved by the loss of the property thrown overboard; and then it is reasonable that the owners of the saved goods, should make a just compensation to the owners of the goods thrown overboard—but this does not take place, where the casting of the goods into the sea, is not the cause of the salvation of the goods preserved: and they relied upon *Beawes*. With respect to the wages, sailors lose them where the vessel is lost, from the time of their sailing from the last port of delivery. This rule is founded in policy, to make sailors careful of the vessel, and alert in the preservation of it, when in danger. They relied upon 3 *Bac. Abr.* 593—*Comm. verbo Navigation.* 3 *Burr.* 1485. *Doug.* 539.—But, the Master is not subject to this rule—there is no case which says he is—he must therefore have judgment. As to the act of limitations, the words used in these letters, will take the case out of it. So there was judgment for the Plaintiff.

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NOTE.—*Vide Ferguson & Wife v. Taylor*, and the note thereto, ante 20, for the acknowledgment requisite to take a case out of the statute of limitations.

Collins v. Dickinson and Allen.

A partition, in a partnership concern, is matter of right, and may be called for at any time.

Bill in Equity, stating a partnership entered into by the Complainant and Defendants in the year 1784, for the purpose of entering, securing and improving the lands in Lake Phelps, and the lands adjoining thereto, and for the purpose of draining and preparing them for cultivation. The bill states many tracts of land secured, the lake drained, houses and mills built, and that the Complainant has advanced much beyond his proportion—the bill prays a partition of the lands, and that the Defendants be decreed to account for and pay to him the overplus of his disbursements.

They pleaded generally, that the purposes for which the company associated were not yet completed, and

Sep. 1795. that such a division as that prayed for, will be ruinous to them should it take place, as each of them separately, would not be able to manage the business so as to derive any profit from it. The account was referred to the Master, and he had made his report to the present term. On the plea, it was argued by *Hamilton*, for the Complainant, that a partner may call for a partition whenever he thinks proper; that he is not obliged to continue his property in the joint concern longer than he is satisfied with the proceedings of the company, and that the difficulty of making a partition, or the inconveniences it will produce to any of the parties, is not of any consideration with the court. He cited 1789, c. 24, s. 1. *Ambler* 236, 590. 2 *Eq. Cas. Ab.* 629, 630. 1 *L. Ray.* 536. *Hob.* 179. 16 *Vin. Ab.* 219, 240, 221. 2 *Ch. Cas.* 237. ———

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On the other side were cited, *Watson's Law of Partn.* 398, 399. *Moll* 460. *Lex Merc.* 31. And it was insisted there must be the consent of all to dissolve a partnership, if one wishes to withdraw before the expiration of the time appointed for the company's continuance; and that when a partner does withdraw that should be done *bona fide*, not where it may occasion a damage to the partnership, as it would do in the present case; nor should it be done with any sinister view.

Per curiam—A partition is matter of right, therefore let it be decreed: and let the Complainant have a decree for monies reported due to him; and let commissioners be appointed to make the partition, and return their proceedings to next term, with maps or plats of the same. A decree was entered accordingly for these purposes.

HALIFAX, OCTOBER TERM, 1795.

State v. Job Garrigues.

If the jury, in a capital case, separate without returning a verdict, the prisoner shall not be tried again for that offence.

He had been indicted for murder, and put on his trial the last day of last term, and the jury, after the court had gone from the bench, but without adjourning, separated without giving any verdict; and now it was moved by the Attorney-General that he might be again put upon

his trial, and he cited *Kelyng* 42, 52. *Foster* 27, 29, 76. Oct. 1795.
H. H. P. C. 294, 295. *E contra* were cited *H. P. C.* *verbo verdict*, c. 47, s. 1, p. 439. where it is said to have been held for law ever since the Revolution, that a jury cannot be discharged in a capital case without giving a verdict.

Per curiam—The rule as laid down in 3 *Co. Inst.* 110, and 1 *Inst.* 227, is general and without exception. that a jury in a capital case cannot be discharged without giving a verdict; afterwards however, in the reigns of the latter sovereigns of the *Stuart* family, a different rule prevailed, that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only: but it is a doctrine so abhorrent to every principle of safety and security, that it ought not to receive the least countenance in the courts of this country. In the time of *James* the second, and since the Revolution, this doctrine came under examination, and the rule as laid down by *L. Coke* was revived with this addition, that a jury should not be discharged in a capital case, unless for the benefit of the prisoner; as if the prisoner be a woman and be taken in labour; or if the prisoner after the jury are charged with him, be found to be insane, and the like; or if at the prisoner's request, a jury be withdrawn to let him in to take the benefit of an exception, which otherwise he would have lost, as in the case of *Foster*. In the present case, the jury were suffered by the court's officer to separate without giving a verdict; as they could not agree to convict, it is strong evidence of the party's innocence; and perhaps he could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages—So he was discharged.

NOTE.—*Vide State v. Spier*, 1 *Det. Rep.* 491, in which this case is recognized and confirmed.

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State v. Alexander Wilson.

A burglary may be committed in a store house standing twenty-four yards from the dwelling house, and separated therefrom by a fence, if the owner or his servants sometimes sleep therein.

He was indicted for burglariously breaking and entering the dwelling house of one *Lawrence Smith*, in the night time, and stealing from thence a number of pieces of hard money, &c. Upon the evidence, it appeared that the house which was broken open, was a store house, standing at the distance of twenty-four yards from the dwelling house of *Smith*, separated therefrom by a fence, and that it did not stand in his yard. The other facts necessary to support the indictment, were well enough proven.

Per curiam. With respect to the term dwelling house, as used in an indictment for burglary, it hath a technical meaning, not that meaning which is annexed to it in common acceptation. All out houses standing in the same yard with the dwelling house, and used by the owner of the dwelling house as appurtenant thereto, whether the yard be open or enclosed, are in the eye of the law parts of the dwelling house; and will satisfy that word used in an indictment of burglary. So if a store house stand out of the yard and curtilage, and be separated therefrom, but the owner or his servants sometimes sleep therein, it is in law a dwelling house. 1 *H. H. P. C.* 557. And here it being proved by *Solomon Smith*, that he acted as the store keeper of *Lawrence Smith*, and as his servant, and that he had frequently slept in this house through the fall in which the breaking was committed, if the jury believe the prisoner is the person who broke the house, and stole the money as laid in the bill of indictment, they ought to find him guilty of the burglary. He was found guilty accordingly, and had judgment of death; but the Governor pardoned him.

NOTE.—*Vide State v. Twitty*, ante 102. *State v. Langford*, 1 *Dev. Rep.* 253.

Anonymous.

The words of a will, directing all just debts to be paid, will prevent the bar of the statute of limitations.

One of the questions in this case was, whether the Plaintiff was barred by the act of limitations. The note

of hand was given in the year 1783, in the month of ^{Oct. 1795.} October or November. An action was brought seven or eight years after, but in the mean time Defendant died, not long before the commencement of this suit, and by his will in one part thereof said, after payment of all my just debts, then I give, &c. *Per curiam*—The act of limitations was made to prevent the inconvenience of stale demands, and to hinder them after a reasonable length of time from rising up to charge him. This law though very generally reprobated, is founded upon principles of justice, and ought to be adhered to; and had the act never received an interpretation which might govern the present case, the court would now be of opinion, that the using of such words in a man's will, ought not to prevent the operation of that act, for that they are words common in almost all wills: but these words by former decisions, have been held to have that effect, for the executor without such words is bound to pay all recoverable debts; but these words are supposed to bind him to something further—the payment of all just debts, 2 *P. Wil.* 373. *Salk.* 154. 2 *Vern.* 141. whether recoverable at law or not, and are deemed to mean more than the law lays upon the executor without any such words used. The Plaintiff had a verdict and judgment. *Baker* for Plaintiff, and *Davie* for Defendant.

NOTE.—*Quere*, whether this case is not overruled by the case of *Walker's Ex'rs. v. Campbell & others*, 1 *Hawks.* 304, in which it was held, that a debt barred by the statute of limitations is not revived by a direction in the debtor's will, that certain slaves be sold "and with the proceeds thereof, after paying my debts, they," &c. See also *Burke v. Jones*, 2 *Ves. & Beam.* 275.

**Susannah Winstead v. the Heirs and Terretenants of
Richard Winstead, deceased.**

A widow, since the act of 1784, can claim dower only out of the lands of which the husband died seised or possessed. A levy upon lands in the lifetime of the husband divests the widow's claim for dower upon those lands, though they may not be sold until after his death.

This was a petition for dower, drawn according to the directions of the act of 1784, c. 22, s. 9, and the counsel have agreed to this special case. *Winstead* possessed of the premises, was sued, and a judgment was obtained against him in Edgecomb County Court; an execution issued, and the Sheriff levied on the land and other pro-

Oct. 1795.  perty a few days before the death of *Winstead* ; and after his death, the personal property not being sufficient to satisfy the debt, he sold the land, and the Defendant *Duncan Dew* purchased. The question is, as the husband died since 1784, whether the Plaintiff is entitled to dower.

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This special case was made on account of a difference in opinion between Judge WILLIAMS and Judge HAYWOOD. The latter being clearly of opinion she was not entitled to her dower ; the other being very clear that she was entitled.

The following is the opinion of Judge HAYWOOD, transmitted to the court—Judge WILLIAMS sent none.

The two questions here, are, whether a widow be entitled to dower, in lands of which her husband died seised or possessed only ; or whether she be entitled as at common law to dower, in all the lands of which the husband was seised during the coverture ; and secondly, whether lands are evicted out of the possession of the debtor, by the Sheriff's levying an execution upon them in the lifetime of the debtor.

As to the first point, it was a principal object of this act to take off all restraints from the alienation of lands, to the end that this species of property might be accommodated to the purposes of individuals engaging in useful undertakings, and to the principles of a Republican government. This act destroys estates tail entirely, and in order to enable husbands to convey their lands, free from the incumbrances of the wife's claim of dower, it directs that this claim shall commence for the future, from the death of the husband ; making a provision for her against unfair conveyances, made by the husband with intent to defraud her of her dower ; which plainly discovers the meaning of the Legislature to be, that with respect to fair conveyances, she was not entitled to dower—which point at once proves and establishes the doctrine, that dower at the common law is abolished ; for by the common law, the widow was entitled to dower in all the lands the husband sold after the coverture ; whereas now, she cannot claim dower in them if fairly sold. If a wife can yet claim dower at the common law, the husband cannot convey his lands free from incumbrances, and the object of the Legislature is not attained. An affirmative

act, if it imply a negative, may operate as a repealing act—now if a widow since the passing of the act of 1784, is to have dower in the lands her husband died seised of, it seems to follow, she is not entitled to dower in lands he did not die seised of: otherwise where was the use of saying she should have dower out of those lands he died seised of. If she is still entitled to dower at the common law, the whole of the eighth section of the act of 1784, is nugatory and of no signification—the first thing it provides is, that she shall have dower of the lands he died seised or possessed of—she was entitled to that, at the common law. It next provides against fraudulent conveyances to defeat her of her dower—the common law entitled her as from the time of the marriage, and any subsequent conveyance, whether fair or unfair, was subject to her dower. Thus the whole clause is useless and vain—but, if it is alterative of the old law, then every word has its full effect and operation: and surely a construction that gives some effect to every word, is much preferable to that which destroys a whole clause. Oct. 1795.

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If it be said the act intended to create a species of dower different from that at the common law, allowing the widow in some respects greater advantages, though less in others, and to give her choice either of the one or the other, I ask, where is the authority for such a supposition? The act speaks of no such election, nor is there any reason founded in the spirit of the act to presume such to have been the intention. And besides, the last clause of the act of 1784, expressly repeals all laws that come within the purview of that act: whereby, as I understand it, all laws providing for the same cases that are provided for by the enacting part of the act, are repealed; and this expressly takes in the common law respecting dower. I am therefore of opinion, that since the act of 1784, c. 22, a widow is only entitled to dower out of lands her husband died seised or possessed of, and cannot have it out of lands he dies seised of during the coverture, but conveyed away before his death.

As to the second point, whether lands are evicted out of the possession of the debtor by a Sheriff's levying an execution upon them in the lifetime of the debtor; for if they are, then the Plaintiff's husband was evicted, and so not seised and possessed at the time of his death, as the act requires. I think there can be no doubt, but that

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the completing act of an execution, hath relation to, and effect from, the time of the lien occasioned by the judgment, or the execution attaching on the property: or in other words, that every sale upon a *fi. fa.* hath relation to the teste of the writ, and is a sale from that time; if not; in the case of lands, from the time of the judgment, and every extent upon an *elegit* is an extent from the time of the judgment rendered. The reason of this fiction is founded in justice—it is for the purpose of preventing subsequent incumbrances interfering with the interests of the Plaintiff, who might be defeated of his debt, if such subsequent incumbrances were allowed to have priority to sales happening afterwards, though the executions had issued before. For this, or some such reason, I presume it is, that in every case where the law makes a lien to take place on the property, whether real or personal, the execution is good from that time. In the case of a recovery of a real estate, the recoverer died before execution issued, yet as the judgment was as of the first day of the term, and the execution also, the execution when executed, vested the property in the recoverer, as from the time of the judgment; so that the recoverer was divested of the possession and seisin, as from the first day of the term when the judgment was given, 1 *Rep.* 106, *b*, *Shelley's case*. When a judgment is recovered in debt against the ancestor, if a *sci. fa.* be taken out against the heir, and others terretenants, this *sci. fa.* goes against the heir as a terretenant, and not as heir; because, the land being bound by the judgment against the ancestor, is in *custodia legis*, and descends not to the heir; and if under such circumstances the heir gets possession, he is treated as a terretenant. 3 *Rep.* *Herbert's case*. In the case of *Baker and Long*, decided in this court, one of the two parcels of land laid in the declaration, was sold under a judgment given against the ancestor in his lifetime; the other parcel under a judgment against the executors, and by the judgment of the court. The Plaintiff recovered the latter, and lost the former, because, the judgment against the ancestor had evicted the lands out of his possession so far, that they did not descend to the Plaintiff. In the case of an execution bearing teste before the death of a testator, but not executed nor even levied till after, it may be lawfully executed; because the lien on the goods commenced with the teste of the writ, and the legal pos-

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session of the goods are from that time in *custodia legis*, and are not in the possession of the executor as executor. 2 *L. Ray.* 849. 850. But if the teste of the writ of execution be after the death of the testator, there the goods in the hands of the executor cannot be touched. 3 *P. Wil.* where, it is held by *Lord Parker*, that the possession of the goods are evicted out of the hands of the testator in such case, by the teste. Consider it upon the reason of the thing, if the levying the execution will not evict the possession, then what will? Will the sale by the Sheriff do it? The Sheriff has no right to give possession.— The actual corporal possession may still be held by the debtor, but the sale passes the fee and all the interest that the debtor hath. If it is the sale, or the levying either, that works a legal dispossession, then the law no longer governs property in these cases, but the Sheriffs in the different counties; for the Sheriff by delaying to levy and sell, or by forwarding the levy and sale, will make the widow to be entitled or not to dower, and the creditor to lose part of his debt or not. Suppose in the present case it had pleased the Sheriff to sell on the day he levied, then she would not have been entitled to dower; but as he has sold after the death of the husband, she is entitled. This involves such an absurdity as cannot be endured.— Most clearly, the rights of the widow do not depend upon the good pleasure of the officer; the law undoubtedly hath fixed them upon a better foundation; the law makes the lien of an execution against lands, to commence from the teste of the writ: and were it not for the case of *Bell and Hill*, I should think from the judgment; and to that all subsequent acts have relation; so that the purchaser is in as from that time, and of course, has all the interest that the debtor had as from a time prior to his death. Like the case, where a testator by his will empowers his executors to sell his land, and after his death the executor sells accordingly, the vendee is in by the testator. The law deems it a sale by the deviser himself, for the purpose of over reaching the descent to the heir. *Plow. Com.* 475. The possession of the heir in that case, after the death of the deviser and before the sale, is just such a kind of possession as that of the husband in the case now before us was, after the teste of the execution or perhaps the judgment, of no consideration in law, when a sale doth in fact afterwards take place. Let us suppose another case. If a man devise that his executor

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Oct 1795.  shall sell his lands, and die ; and after his death his heir, who is a married man, enters and dies, and afterwards the executors sell pursuant to the will, would the wife of the heir be entitled to dower ? Surely she would not.— Yet in this case, the heir was as much seised of the land and inheritance as the husband was in the case now before us. But in both cases, the seisin and possession of the husband and heir vanish away when the sale takes place, because then, the purchaser is in ; in the one case, from the deviser immediately, and in the other, from the commencement of the lien upon the land : and whether that commence with the judgment, the teste of the writ, or the levying, each of these preceded the death of the husband. I have no doubt but that judgment should be for the Defendant, the vendee.

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In October, 1796, the cause was again moved, the Judges MACAY and STONE being present : but Judge MACAY not being prepared to give his opinion, the cause was adjourned. It was afterwards moved when Judge WILLIAMS was present, who inclined to change his former opinion—afterwards the cause went off without a decision.

NOTE.—This case was supported by the present Supreme Court in *Hodges v. McCabe*, 3 Hawks 78, but overruled by *Frost & Wife v. Etheridge*, 1 Dev. Rep. 30. When a person conveys his lands in trust to satisfy creditors but continues in possession till his death, his widow is not entitled to dower therein. *Taylor v. Parsley*, 3 Hawks 125.

———— v. Deberry.

Case. For nuisance in erecting a mill. *Per curiam*, HAYWOOD only present—This action will be for every fresh continuance after a former action brought. It is not usual to give heavy damages in the first verdict, that is chiefly to ascertain the fact whether nuisance or not. If the party afterwards remains obstinate and a second action becomes necessary, there the damages are usually high. There is some evidence of the assent of the Plaintiff's father, that Defendant might build the mill ; and of a subsequent agreement, that the Plaintiff's father would rest satisfied if the Defendant would cut down the dam to seven and an half feet ; but as no land can be conveyed without deed or other notorious acts, so a man's lands cannot be charged by any matter of less solemnity. A licence to overflow a man's land by a mill-pond,

for this reason, is not good if only verbally given—and this to avoid the danger of charging or affecting a man's real property by suborned oaths. Mar. 1796.

NOTE.—Upon the first point resolved in this case, see to the same effect *Carruthers v. Tillman*, post 501. The act of 1809, Rev. c. 773, points out a new mode of obtaining redress where lands are overflowed by a mill-pond, which takes away the common law right of suing unless in the case specified by the act. *Mumford & others v. Terry*. 2 Car. Law. Rep. 425. In proceeding under the act of 1809, if the Defendant dies, the heirs cannot be made parties, and the suit must abate, *Fellow v. Fulgham*, 3 Murph. 254. With regard to the license see *Cook v. Stearns*, 11 Mass. Rep. 533, cited in the 3d Am. Ed. of *Comyns on Cont.* 80, where it is said that a verbal license may excuse a trespass upon lands, though it cannot convey any permanent interest in them. The distinction seems to be founded in justice and does not at all trench upon the rule of law which requires interests in land to be conveyed by deed. A license to overflow a man's land by a mill-pond would create no permanent right or interest, if only verbally given; but if the grantee of the license does the act, surely he may justify when attempted to be treated as a trespasser. It is true the license may be countermanded, and then the grantee must forbear, or he will make himself from that time (what he would have been without a license) a trespasser.

NEWBERN, MARCH TERM, 1796.

Den, on the demise of Slade v. Nathan Smith.

An actual possession is not necessary to prevent the operation of the statute of limitations until an adverse possession commences, which adverse possession must be a continued one for seven years to bar the Plaintiff. A deed, which is, in form, a bargain and sale, except that the consideration is expressed to be love and affection, instead of money, may be construed a covenant to stand seised. It seems that judicial proceedings speaking of an act of Assembly, may be evidence of such act when it is lost by time. A bare right of entry cannot be transferred.

Ejectment. For 360 acres of land on the North side of Trent river, beginning at the mouth of a creek, then down the river, thence by a line at nearly right angles from the river, and so round to the creek, and down the creek to the beginning. The Plaintiff's title was deduced thus, the Lords Proprietors on the 12th November, 1713, granted to *James Castage*; he died under age and without issue, leaving an only sister *Jane*, married to *Finyaw*; whom she survived, and in the year 1764, she conveyed to her son *James Finyaw*. He on the 24th March, 1791, conveyed to the lessor of the Plaintiff, the whole three

Mar. 1796. hundred and sixty acres, describing it by the boundaries mentioned in the original grant. This action was commenced in the month of April, in the year 1791. On the part of the Defendants it was proven by an old deed, dated the 10th of January, 1714, and by the records of the court of orphans of the same year, that one *Brice*, (249) guardian of the grantee *Castage*, had by permission of the court of orphans, sold one hundred and sixty acres of this land, beginning at the lower corner tree on the river, running up the river, and then into the woods for complement. A deed of 1744, and another of 1764, were produced; in the latter of which *Mr. Cornell* was a party. These proved that the second line of this tract, and the third corner, were deemed at those periods to be the line and corner of *Vassimore*, the bargainee, who purchased of the guardian; whereby the location of the 160 acres was confined to the lower part of the tract. On the part of the Defendant it was further proven, that on the 23d of July, 1774, *Mr. Cornell* obtained a grant for a large part of this tract of land, adjoining the river and creek, and that in the spring of the year 1775, in the month of April, he took possession; which hath been continued ever since; first by *Edwards*, his son-in-law, and by his widow and her children since.

Davie, the counsel for the Defendant, argued that as there was no evidence of possession in the *Finyaws*, for a great length of time preceding the entry of *Cornell*, that therefore *Cornell's* entry had taken away *Finyaw's* right of possession. For when a grantee has not had possession for seven years before, and another claimant enters, as *Cornell* did in this case, the act of limitations will toll the entry of such person. Seven years passing without an entry on the part of the first grantee, and another person then found in possession, tolls the grantee's right to turn the other out of possession—his right of possession is lost—there is no necessity under the act that the possession of the enterer should be continued seven years.

Per curiam—Whatever construction may have prevailed in England upon their statute of limitations, it is clear with respect to our act, when a man hath obtained a grant of land, he thereby gains a constructive possession, which continues until an actual adverse possession commences, and that adverse possession must be continued seven years, before the *jus intrandi*, or right of

possession of the first grantee, is lost. A single act of entry cannot take away the grantee's right of possession; because such entry may be made without any notoriety, whereas seven years actual possession affords notoriety, and as it were calls upon the owner to assert his right. In the present case, unless there hath been such actual possession for seven years, as is allowed of in law computations, the Plaintiff's right is not tolled. As to the time elapsed between the sixth of March, 1773, and first of June 1784, that was not allowed of by the express direction of two acts of the General Assembly; and the possession that can be counted in the present case, is only from the first June, 1784, to the time of the commencement of the action, which was short of seven years by two or three months. An objection hath been made to the propriety of disallowing the time between the first of March, 1773, and the fifteenth of November, 1777, the act of 1777, only saying it should be disallowed when pleaded to actions brought; whereas the act of limitations is never pleaded in this action of ejectment. The answer to that is, *ubi eadem est ratio, ibi eadem est lex*, the reason of that provision was, because during the time that intervened between these two periods, there were no courts in this country; does not this reason apply with equal force to an ejectment case as to any other? A man out of possession when the law provides him with no means to gain possession, should not have the not getting of possession during that time imputed to him as an abandonment of his property, any more in the case of a real estate than in that of a personal estate. What is still a more full answer to the objection is this, that if the act of 1777, had not been made, the act of limitations would not have run during the time there were no courts in the country, to which the Plaintiff could apply for the recovery of his right. No laches in such case could be imputed to him, nor could any presumption be founded upon his delay, as there is in all cases where the act applies. The court here cited *Co. Litt.* in his chapter of Entries, where it is laid down, that a descent cast in time of war, will not toll the entry of him who hath the right of entry, because, saith the book, where the courts are not open for the administration of justice, whether occasioned by rebellion, insurrection or foreign invasion, it is said to be time of war, and laches are not then imputable to the

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Mar. 1796. party. So here, tho' the act had not been made, the intervening time was such as could not subject the Plaintiff to the imputation of laches. He could not in that time assert his right. The courts of justice were shut up as to the possession of *Edwards*. In general, it is very much to be doubted whether such a possession had it continued for seven years, could have tolled the entry of the owner—he had no deed nor any colour of title: but it is unnecessary to give any opinion upon this point now. The Defendant's counsel then proceeded to state other objections to the Plaintiff's recovery—he argued that (251) the words used in the deed from *Jane Fingaw* to her son, were give and grant; and the consideration, natural love and affection: it therefore could not be a bargain and sale, for want of a valuable consideration, and there were no words made use of to shew the intent of the parties, that it should operate as a covenant to stand seised: therefore it must have been intended as a common law conveyance, and then it was void for want of livery and seisin. He cited 2 *Bl. Com.* 310, 316, 311, 227. This was answered on the part of the Plaintiff, by citing 5 *Bac. Ab.* 362. 2 *Wils.* 22, 78.

Per curiam—There is no doubt but that the conveyance in the present case, does operate as a covenant to stand seised, *ut res magis valeat*, and therefore that it is good in law.

The Defendant's counsel then urged, that though there was no act of Assembly to be found in any of the printed books, previous to the date of the deed from *Brice*, the guardian, to *Vassimore*, in 1714, and to the proceedings of the Orphan's Court in the same year, the history of this country would prove there were Assemblies held previous to that time; the Lords Proprietors landed here in 1711, there are many old grants bearing date in 1711 and 1712, and some as early as the year 1706; the deed itself purports to be made pursuant to an act of the General Assembly, and the Orphans Court on their record say, their consent to the contract was given pursuant to an act of Assembly.

Per curiam—As to this point the general rule is, that the court must declare the statute law as it is to be seen in acts and statutes yet extant: that law however, is sometimes from necessity otherwise collected. It hath been said by very learned men, that many parts of the

common law, were acts of Parliament worn out by time. *M.* 1796. 2 *Wils.* 248. The common law is preserved and evidenced by judicial proceedings. In the present case, there are judicial proceedings which speak of an act of the Legislature that is not now extant, upon which the deed to *Vassimore* purports to be founded. The deeds of 1744 and 1764, prove *Vassimore's* having a corner and boundary line in this tract of land. This proves that for a long time after the date of *Vassimore's* deed, the neighborhood recognized it as a valid transaction. All these circumstances, but particularly the proceedings of the Court of Orphans, seem to be enough to justify the conclusion that the act of Assembly spoken of, in the proceedings of the Orphans' Court, did once exist: but there is no absolute necessity for resting the cause upon this point; and as it is a new one, the court will not give a positive opinion upon it. (252) The Defendant's counsel then made another objection, which was, that in 1771, and for a considerable time before, up to April 1775, *Cornell* and *Edwards* had been in the actual possession of part of the land, namely, that part adjoining the river and creek, claiming it as their own under a grant from the King. As to the upper part, they had not been in possession, neither had the *Fingaws* any actual possession for fifty years back; therefore, as to the part held under the grant of 1774, *Fingaw*, the vendor, in 1791, at and previous to the time of his conveyance to the lessor of the Plaintiff, had no other means of acquiring the possession, but by a suit at law; he had not the actual possession, but only a right of entry; and that by the known rules of law, he could not sell or convey to another. For this he cited 2 *Bl. Com.* 290. *Co. Litt.* 214 a, and the case of *Few* and *Alves*, decided at Hillsborough last term. On the other side were cited *Espinasse* 433, who cites *Salk.* 423.—Upon this point the court were with the Defendant, and so gave in charge to the jury. They found the Defendant not guilty as to all the land comprised in *Brice's* deed to *Vassimore*, and guilty for the residue; and there was judgment accordingly.

NOTE.—Vide upon the first point, note to *Strudwick v. Shaw*, ante 5. *Park v. Cochran et al.* ante 178.—And upon the last, see *Dennis v. Farr*; 1 *Murphey* 138. *Clark v. Arnold*, 2 *Hay.* 227.

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Den, on the demise of Pollock v. the Heirs of
Zemiriah Harris.

When a natural boundary, and courses and distances, are all given in a deed, the natural boundary will prevail in cases of a variance ; and in doubtful cases, a regard to this preference must always be observed.

(253)

Ejectment. The patent under which the Plaintiff claimed, was the oldest. It called for trees standing in a swamp at one place, in a branch at another, in a pocosin at another, for a pine standing in a marsh near a hill, thence to a pine in an Indian old field near the river Neuse, thence a course and distance across the river to the North-west side of the river, thence a course and distance to a particular corner. The line from the pine last mentioned, run according to the course and distance in the patent, crosses a part of the old field and river also. It also runs through an adjoining marsh in a very miry part of it, stopping where that line intersects the river; and running the next line according to the course and distance in the patent, it crosses the river in two places (the river there forming almost an island by the circuitry of its course) and terminates on the South-east, instead of the North-west side of the river. If that line is made to terminate in the peninsulated piece of land, and on the North-west side of the river, and the next line be run from thence according to the course and distance in the patent, it would not cross the river as it ran at the date of the patent. The river from one part of this bent to the other, which that line would not cross, having been formed since by a canal cut for the purpose, and in that case the Plaintiff would be entitled to recover part of the land described in the declaration ; but if the second line from the pine is made to terminate on the North-west side of the river, immediately after crossing it, not regarding the distance in the patent, then the next line run according to the course and distance in the patent from thence, crosses the river in two places, and in that case the Plaintiff is not entitled to recover : or if that line is continued until the distance called for in the patent is completed, the next line from thence crosses the river in two places, and in that case the Plaintiff is entitled to recover. The latter is the line contended for by the Plaintiff, the former that contended for by the Defendant.

ants. If the land however should be run out according to the courses and distances in the patent from the beginning, then the lines do not extend to the swamp, pocosin and marsh, severally called for in the patent, and the land is very far within the lines that do extend to them—so far within them that the Plaintiff is not entitled to recover any thing. These courses and distance lines were distinguished from the others which were extended to the several natural boundaries mentioned in the patent, by being called the dotted lines. Mar. 1796.

Per curiam, after argument, as to the dotted lines—The dispute with respect to them, may be decided by laying down the rule with regard to boundaries: it is this, wherever the beginning is ascertained; and the lines from thence, are by the words of the patent to terminate at a natural boundary, as a swamp, branch, creek, river, mountain, hill, or the like, if either the course or distance mentioned in the patent will not extend the line to the natural boundary, the course or distance, or both, must be disregarded, and the line notwithstanding these, must be extended to that natural boundary if the course will lead to it; but if the distance falls short, the line must be extended beyond the distance, till it arrives at the natural boundary. And in the present case, if the dotted line will not extend to or intersect the natural boundaries called for in the patent; and if on the contrary, the other lines will extend to them, the result in point of law is, that these latter are to be deemed the lines described in the patent; and then there can be little doubt with regard to any of them, until we arrive at the pine in the marsh. As to the line leading from thence, it is remarkable that the counsel on both sides have admitted that there was no actual survey of the land before the patent issued; hence follows an unreasonableness in supposing, that the line from thence was run through the marsh. It was of no value in those times, and the surveyor and chain-carriers would hardly have run through so miry a part of it, for the purpose of taking in so small a portion of it. If we suppose the course mistaken, which might easily be, and that the line run in fact along the edge of the marsh, and in that direction terminated on the river, it will still terminate in the old field, which may be considered as a natural boundary; and in this direction the distance will be com-

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pleted without crossing the river, which the patent doth not call for, as it has done in other instances where the line does cross the river. That direction and termination is attended with this further advantage, that the next line drawn from thence according to the course and distance in the patent, crossing the old field longitudinally, crosses the river but once, as mentioned in the patent, and completes the distance in the peninsula without crossing the river a second time; and then the termination of that line is on the North-west side of the river, as called for in the patent, and not on the North-east. It would be attended with this further advantage, that the next line drawn from the termination last mentioned, according to the course and distance in the patent, issues from the peninsula, through the narrow neck of land that connects the peninsula with the adjoining land, where at the date of the patent there was not any canal, and will not cross the river as it ran at the date of the patent.—Whereas if it be drawn from either of the other two points, it will cross the river at two places, although that circumstance is not mentioned in the patent. The circumstances upon which this supposition is founded, are all of them circumstances arising from the natural boundaries that are in this case, namely, the marsh, the old field, the river crossed but once, the line terminating on the North-west side, and the river not crossed at all by the last line; and as they are furnished by a consideration of the natural boundaries, they are competent to justify the jury in disregarding the course called for in the patent, of the line from the pine; especially as the patent mentions natural boundaries in every other instance where the lines did intersect them, and as in the description of the last line, it has not mentioned crossing the river at all; whereas it must cross it in two places, if what either the Plaintiff or Defendant contends for, be true. According to the before mentioned supposition, it will cross at the canal, where at the time of this patent there was none; and so it will be accounted for, why the patent in describing this line, has not mentioned the river, as it did with respect to the line next preceding; and in every other case where a natural boundary was touched. If this supposition be adopted, the Plaintiff is entitled to recover a part of what he contends for only. The jury found the Defendant not guilty.

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NOTE.—This verdict must have been founded upon a supposition, Mar. 1796. that the line in controversy was to be drawn from a termination of the line next preceding, being at a point immediately after its crossing the river, and not at a point further on in the peninsula—from whence the last line being drawn by the course and distance in the patent, would have crossed the canal.

NOTE.—*Vide Bradford v. Hill*, and the note thereto, *ante* 22.

Lowthorp v. Smith.

If one of two joint owners of a vessel, forcibly take possession of her, and send her to sea, without or against the will of the other, and she is lost, he will be liable in trover for her.

Trover, for one half of a schooner. This schooner formerly belonged solely to *Smith*; he sold the one half to *Lowthorp*, who superintended the affairs of the vessel for two or three voyages; but on her returning from the third voyage, which was to London, *Smith* forcibly took possession of her. The next voyage was in February, to Charleston—this voyage *Lowthorp* forbade. The next voyage was intended to Cape Francois—it was neither forbidden or consented to by *Lowthorp*; *Smith* sent her out without consulting him. The vessel was lost on her outward bound voyage. The counsel for the Plaintiff cited *Buller's Nisi Prius* 34. *Salk.* 290. On the part of the Defendant it was admitted, that where one of two joint owners takes the whole to himself, and destroys the thing owned, trover will lie; but if the thing be forcibly taken at first, and afterwards used as the common property of both, and for the benefit of both, and whilst so employed shall be lost, that such loss is a common one: here the vessel at first was forcibly taken by the Defendant, and the first voyage to Charleston forbidden; but it does not appear they afterwards disagreed about the vessel. The last voyage was not forbid by the Plaintiff, and it may be reasonably presumed, as there is no evidence to the contrary, that it was by consent.

Per curiam—If one of two joint owners takes possession of the whole, no action will lie for this, for one hath as much right to the possession as the other; but if after taking possession he destroys the property, he is then liable; because the joint ownership does not empower him to destroy the property of the other; and if such joint owner, after getting the sole possession, shall without the consent, or against the will of the other owner, send the

MAY 1796. vessel to sea, and she be lost in that voyage, the jury may consider such loss as a destruction of the vessel, occasioned by the joint owner by means of sending her to sea, and find for the Plaintiff.

The jury found accordingly for the Plaintiff, being of opinion that the loss in this case was a destruction occasioned by the Defendant, and of course, a conversion in him—they assessed damages to £1072.

The court cited *Molloy b. 2, c. 2, s. 2, 3.*

NOTE.—*Vide 2 Saund. 479. Bull. N. P. 34. 35. Co. Litt. 200 a.*

Rogers v. Briley.

The interest to exclude a witness to a will, must be either an express legacy directly to him, a legacy with an express use for him, or a secret trust and agreement on the part of the legatee for his use; and a declaration by witness that the legatee holds for his use, will not exclude, unless it be proved, that the legatee had made an engagement to hold for his benefit. Though a fact be positively sworn to, by one or two witnesses, and they agree pretty well in their testimony, yet the jury, either from their character or the circumstances of the case, may disbelieve them, and find against their evidence.

Briley had offered for probate a paper, purporting to be the will of one *Jones*, whereby the greater part of the property was devised to him. This probate in the County Court of Pitt, was opposed by *Rogers*, who had married the only daughter of the deceased: and the issue made up, was, *devisavit vel non*, pursuant to the act of 1789. c. 23, s. 1. One of the subscribing witnesses, was *Briley*, son of the legatee; he was offered to prove the will, and there was an objection to the competency of his testimony, upon the ground of his having said in conversation, that the property was devised to his father, for the use of him, the witness, or in trust for him; and the reason why it was not devised directly to him, was, because he was involved in his circumstances, and his creditors might have seised on the property had it been bequeathed to him. A witness in court, proved he had made these declarations.

Per curiam—The objection to this witness is as to his competency. The objection is grounded upon this, that if he establishes the will, his father, the legatee, may then be compelled to fulfil the trust he has undertaken. Now in the case of a will, the interest of the witness can only

appear by one of these three ways—either by having a legacy expressly and directly bequeathed, which is not the present case; or by having a legacy bequeathed expressly in trust for him, which is also not this case; or by having a legacy bequeathed to a third person, without any use or trust declared, but upon a secret trust and engagement on the part of the legatee to hold for him—that is not the present case, for there is no proof that *Briley*, the father and legatee, hath ever made any such engagement; and though such a declaration made by the witness, may tend to diminish his credibility, it is not sufficient to remove his competency. The witness was sworn, he proved the execution of the will, as did also the other subscribing witness—they swore to the sanity of the deceased at the time of the execution. Their testimony agreed in the circumstances attending the execution, such as the place, persons present, time of the day; and that his name, as well as that of one of the witnesses, was written by this other witness, *Briley*. Their evidence was corroborated by that of *Mr. Collins*, an Attorney, who swore *Briley* came to him, requesting him to go to the house of the deceased, and write his will for him, and be a witness of its execution. On the other side, it was proven, that the day after the will bore date, the witness *Briley* shewed it to a near neighbor of the deceased, and told him he wished to prove it at the next court, and that the testator at this time was in good health; that the testator had an only daughter, and said only a few days before the date of the will, that he should make no will as he had but one child—that he was upon good terms with his daughter, though he had formerly been otherwise with her first husband—that *Briley* the witness, on the 17th of December, eight days before the will bore date, applied in company with another man, of the name of *Wyatt*, to a *Dr. Jones*, for ratsbane, and got some from him—that some time after, the Doctor saw him, and asked him if he was not the man that had been at his shop, when he denied that he had—that a Coroner's inquest was held over the body, and that it was the opinion of the jury, and the physician who was then examined by them, that the deceased died by poison—his death happened eight or ten days after the date of the will, and *Briley* and the other witness, both said he was well at the time of the execution—the testator, a few days before the date of the will,

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Mar. 1796. expressed his ill opinion both of the witness *Briley*, and of his father, the legatee, in strong terms.

(258) *Per curiam*—Though a fact may be positively sworn to by one or two witnesses, and though these witnesses may concur in many of the circumstances, the jury are not absolutely bound to believe the fact they swear to, if they have reason, either from the character of the witness, or the circumstances with regard to that case, to disbelieve them. On the contrary, a great number of circumstances coming from witnesses of good credit, and concurring in the establishment of any position, might establish it. The court then recited the circumstances before stated on both sides, and left it to the jury upon the consideration of them, to say whether or not this will had been duly executed. The jury found it was not the will of the deceased.

Hartsfield v. Westbrook.

One line of a boundary was from a poplar on a swamp, "thence down the swamp to the beginning": *held*, that the swamp, and not a straight line from the poplar to the beginning, is the boundary.

The patent called for a beginning at a tree, which stood (though not so expressed in the patent) near the swamp, thence in a rectangular course from the swamp, thence South degrees West, thence North to a pine (which also stood near the swamp, but not said to be so in the patent) thence to the beginning, not taking any notice or making any mention of the swamp. The patentee conveyed part of this land to *Eaves*, who conveyed to *Hartsfield*. *Eaves's* deed began at the beginning corner of the patent, thence a rectangular course from the swamp, thence South, thence North to the swamp to a poplar, thence *down the swamp to the beginning*. The trespass complained of, was on the opposite side of the swamp from the poplar. It was within the land of the Plaintiff, if a direct line from one boundary to the other was the true one; but not within it if the swamp was the true boundary.

Per curiam—The swamp is to be considered as the boundary—but that this judgment may not be hurried, you may move the matter at another day. Should the opinion of the court be altered in the mean time, they

will then set aside the nonsuit now ordered. The Plaintiff was nonsuited—and a few days afterwards it was moved by *Gen. Davie*, that this nonsuit should be set aside, saying he wished the opinion of the court upon this point, because another suit was depending in court upon the same point, between *Hartsfield* and *Fuller*, which would be disposed of immediately should the court be of opinion that the swamp was to be considered as the boundary. Mar. 1796.

Per curiam—A case similar to the present was decided at Edenton last term, between *Foster* and *Sandifer*—the expression there was, “thence along the river;” here it is, “thence down the swamp to the beginning”—they are both of the same import, and the case of *Foster* and *Sandifer*, is therefore fit to govern the present, and accordingly the swamp in the present case, is to be considered as the boundary.—Let the nonsuit remain, and the rule to show cause why it should not be set aside, discharged.—Then *Gen. Davie* dismissed the other suit of *Hartsfield v. Fuller*.

NOTE.—*Vide Sandifer v. Foster, ante 237.*

Blackledge v. Simpson.

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When to a bill filed, stating errors in an account settled four or five years ago, Defendant pleaded specially, denying each error and also all fraud, if the Plaintiff does not take issue, and prove the error or fraud, the court will not disturb the account.

This was a bill stating errors in an account settled between the Plaintiff and Defendant some four or five years ago, particularizing the errors, and praying to have them rectified. The Defendant pleaded specially and particularly to each error assigned, that there was no such error as was assigned, and denied the fraud and imposition charged in the bill, both in his plea and answer.

The plea was now argued, and after argument: *Per curiam*—Where a bill is for an account generally, then the plea of a stated account is a good plea in bar; for the account having been settled by the parties, the presumption is that it hath been fairly settled, and the court will not open it again merely because asked for by the party: but where the bill states a settled account and errors in the account, and fraud or imposition in the settlement, then if the Defendant does not deny the error and fraud, the

Mar. 1796 Plaintiff's allegations remain unanswered, and the court will open the account as to the errors pointed out; but if the plea denies the error and fraud, and the fraud be denied in the answer also, so that issue may be taken upon the error and fraud, the plea of a stated account is a good bar in law. And if the Plaintiff doth not take issue, and prove the error and fraud, the court will not open the account in any manner; but if issue be taken upon these points, and found for the Plaintiff, then the court will order the account to be opened as to the errors complained of and proved—but the plea and answer must deny the error as positively as they are alleged, so that issue may be taken on these very points—for want of that particular, the plea would be ill—but here, it is full, and issue may be taken precisely and specially upon the errors and fraud, and therefore the plea is good and must be allowed; but the Plaintiff must still reply and take issue.

Den, on the demise of Sasser per Guardian v. Blyth.

A, seised in fee of the premises in question, executed a deed to his son, in which he stated that for the preferment of his son, he conveyed the land to him and to his heirs forever: Provided that this deed shall not take effect during the lives of the grantor and his wife; but the premises should remain first to him for his natural life and then to her for her life: *held*, that the last clause of the deed was a good reservation of the life estates and that the fee is a good remainder upon them.

(260) **Ejectment.** And special verdict, stating in substance, that *John Sasser, sen.* being seised in fee of the premises in question, in April, 1774, executed a deed to his son; in which it is stated that for the better preferment of his son, &c. he conveyed to him several tracts of land described in the deed. And amongst others, the premises in question, to him and his heirs forever. In which deed is contained a clause to the effect following, *to-wit*: Provided that this deed shall not take effect during the lives of the grantor and his wife, but the premises therein mentioned should remain, first to him for his natural life, then to his wife for her natural life. *John*, the grantee, died seised in fee, intestate, leaving a brother who died intestate, leaving *James*, his only son, an infant. *John*, the elder, also on the fifth of June, 1778, executed a deed for the premises in question, in consideration of natural affection, to his daughter *Mary Blyth*, and her heirs, after

his decease, on condition that she and her husband should live with him, and take care of him, and also by another deed, dated the 24th January, 1782, he granted the premises to his said daughter in fee, absolutely and without any proviso. *John*, the elder, died seised in 1782. *John Sasser, jun.* lived with *John*, the elder, till his death, in 1776. *Mary Blyth*, and her husband, lived with him in like manner, and continued in possession after the old man's death. Mar. 1796.

Baker for the Plaintiff—The deed to *Sasser*, the son, may operate as a feoffment, or deed of gift, or conveyance under the act of 1715, c. 38, s. 6, which after directing the registration of deeds, says, and all deeds so done, and executed, shall be valid, and pass estates in lands, or right to other estate, without livery of seisin, attornment or other ceremony in the law whatsoever.—Under this act, all deeds in whatsoever form they may be drawn, where they evince an intent to convey, shall have the effect, if registered, that the parties intended them to have. If intended to operate as a feoffment, they shall operate as such, without the ceremony of livery of seisin. If drawn in the form of a deed of gift, so that in strictness it is neither a feoffment nor deed under the statute of uses, yet if there appears to be a clear intent to pass the lands, and the deed be registered, it shall be effectual. If it can be called neither a feoffment nor deed of gift, if registered, it shall be sufficient—the intent of the parties being apparent. This act meant to establish all deeds without regard to their form, whether they were deeds at the common law, or under the statute of uses, or neither the one nor the other, where there was an intent of the party to convey. We may well consider this as a deed of feoffment, the act takes away the necessity of livery and seisin; and if we consider it as a deed of feoffment, then the proviso is void, as being repugnant to the body of the deed, and the grantee had a present state. New invented clauses against the nature of the estate granted, have always been held invalid, as being repugnant to the grant. *Co. Litt.* 282, b. in the notes. *Co. Litt.* 377, b. in the notes. 6 *Rep.* 41. *Litt.* s. 350, Such as a feoffment with a clause of non-alienation. 2 *Rep.* 23. Or a deed to a man and his heirs, *habendum* from 99 years to 99 years, for 300 years. The third resolution in this case was, that an *habendum* repugnant to the premises is void. *Cro. Elix.* 254, 255. *Haben-*

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dum after the death of the grantor, and no estate limited in the premises, is void. 2 *Ba. Ab.* 498. Grant of the reversion dependant upon an estate for three lives, *habendum* to A. for life, which estate to begin after the three lives were expired, is a good grant of the reversion, and vest a present reversionary interest, the *habendum* being void. 6 *Rep.* 41, *Mildmay's case*. No condition shall make an estate to cease as to one and revive as to the other. Here was a condition, that he should not suffer a common recovery, and if he attempted it, that then the estate to one should cease, and revive and commence in another. All these cases prove that a subsequent part of a deed, derogatory to a former part, and tending to lessen the powers over the estate granted in the preceding part, are void. This proviso is of that nature—it lessens the estate granted in the premises, which was an estate to commence *in presenti*, by making it to commence not till after two lives in being. It is a proviso totally incompatible with the premises and derogatory to them, as it attempts to take from the grantee, part of the estate already granted in fee in the premises: or viewing it in the most favourable point we can, it is in the nature of an *habendum*, that attempts to make an estate of freehold to commence *in futuro*, after an estate in fee already granted in the premises. Such a proviso is void in law; of consequence a present estate in fee passed to the ancestor of the lessor of the Plaintiff, which hath come by regular descent to him, and he is therefore entitled the judgment of the court in his favour upon this special verdict.

But let it be granted that the proviso is valid, or at least equally valid with the other parts of the deed, and to be considered in making a construction upon it. It will then appear to have been the intent of the parties to defer the possession till after the death of the grantee—will it follow, that this is necessarily a freehold to commence *in futuro*? I say it will not: it may be a remainder expectant upon an estate for the life of the grantor, to take effect in possession after the determination of this particular estate—such a construction is made by arranging the clauses in the deed in the same order as they are arranged by the sense and meaning of the deed, and by the intent of the parties; by transposing the clauses, and making the latter part to precede the first, in which order if they had been at first placed, there would have been

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now no objection to this latter part for repugnancy. If such transposition will bring us to the true and evident meaning of the parties, what rule of law hinders the making it? What principle of reason forbids it?—There is none. In truth, such construction is warranted by law; for when land is conveyed under the statute of uses to A. after the life of the grantor, the law deems so much of the use as is not conveyed away, to remain in the grantor; and that being an use commensurate with his life, there still remains in him a freehold use, which will continue, until the estate granted commences in possession, and so not a freehold to commence *in futuro*; but a fee dependant upon a freehold, is conveyed. Covenants to stand seised, are supported upon this principle—if a man covenants to stand seised to the use of another in fee, to commence after his death, it is good to pass the reversion to the grantee. The law implies an use for life in the grantor, sufficient to support the estate *in futuro* when it cometh *in esse*. The principle universally applied in all such cases is, that the law will construe the deed to be such an one, by being which, it will be in law competent to pass the estate as the parties intended, *ut res magis valeat quam pereat*. It is the business of Judges so to construe deeds, as that they shall operate in such manner as will effectuate the intent of parties. 5 Bac. Ab. 365. A covenant to stand seised to the use of one's self, remainder over, is good in the respect of the remainder; as to what a remainder or to stand seised is, the consideration of blood is a sufficient consideration for it. 5 Bac. Ab. 366. A covenant to stand seised, operates without any transmutation of possession. This is the substantial and sole definition of that conveyance, and agrees perfectly with the deed now before the court, and first mentioned in the special verdict; which if not good as a feoffment, grant of the reversion, deed of gift, or conveyance under the act of 1715, for want of some essential circumstance peculiar to each of these species of conveyances, then it may be construed a covenant to stand seised, *ut res magis valeat*, as it agrees substantially with the definition of that instrument—whereby the estate will pass according to the intent of parties. Any words used in a grant, however unlike those that are most proper for such a conveyance, may cause the conveyance to be taken as a covenant to stand seised, if they purport the same in substance as is expressed by the most

Mar. 1796. proper words. 2 *Wils.* 22, 75. *Shep. Touch. Prec.* 82, 83. 3 *Mod.* 237. 1 *Mod.* 175. If the deed now under consideration, can be legally construed to be a covenant to stand seised, as these authorities prove it may, then this deed is no more than a covenant to stand seised to the use of the grantee after the life of the grantor and his wife; and is the same in substance, as if he had covenanted to stand seised, in the first place to the use of himself and his wife, during their lives, and the life of the survivor, with remainder in fee to the son; and is no more in fact than the usual and common conveyance of a present interest, to commence in possession *in futuro*, expectants upon a freehold in being, and is not opposed to any rule of law respecting real estates. But notwithstanding these arguments, let us suppose, as will be contended for on the other side, that this is a void deed, because it attempts to pass a freehold *in futuro*. The consequence will be, that by the same rule their deed is void also, for the estate thereby granted to the daughter, is, from and after the decease of the grantor; and if both deeds are void, then the lessor of the Plaintiff is entitled to recover as being heir at law to the grantor.

Taylor, e contra—*Mr. Baker* has begun with two divisions and hath cited cases for the support of each—I will examine his authorities in the first place, and see how far they really go towards the support of his position. He says this proviso is a new invented clause, repugnant to the premises of the deed, and that by law new invented and repugnant clauses are void; and he cites *Co. Litt.* 282, b. A man granted a rent with a new invented clause of distress, viz: that the grantee should hold the distress against gages and pledges, and yet says the book, by the whole court, he shall gage deliverance. This case proves nothing as to the point it was intended for. A man by his agreement cannot alter the rules of law—the rule of law is, that a distress shall be repleviable; here they agreed that it should not be repleviable, and the question simply was, whether the agreement of the parties should prevail; and because *dispositio legis fortior est quam hominis*, the court held this new invented agreement void: otherwise says the book, by this new invention all replevies shall be taken away. What is proved by this authority is, that an agreement, condition, proviso, or new invented clause (no matter what it be

called) of the parties, repugnant to a known rule of law, shall be void. But I apprehend, although it may be a new invention, if it be not repugnant to any rule of law, it will not be void merely because it is a new invented clause. He next cited *Co. Litt. 377, b.* That also is a case of a new invention, planned, as the book says, by an Irishman, and the invention is condemned; because by law a tenant in tail has a power as incident to his estate, to suffer a recovery, and make a warranty capable of barring it; and the invention was in direct opposition to these powers annexed by law to an estate tail and the person of its owner; and since either the law must have been altered, or this invention declared void, the Judges were determined by the same reasons they were governed by in the former case—but if it had not aimed at the abolition of a rule of law, there would have been no just reason for setting aside the agreement of the parties. These cases, and many others like them that may be found in the books, go upon the principle of a repugnance to some established rule of law. The next set of cases he cites, go upon the principle of repugnance in the latter parts of a deed to those in the former parts; and it must be admitted, that in some cases such a repugnance will make void the latter clause, but in what cases is best explained by the authority cited on the other side, and which is next in order to be commented on. 2 *Re. 23*, admits an *habendum* may be void for repugnance; and says, where the estate in the premises, and that in the *habendum*, both pass by the delivery of the deed, there if the estate in the *habendum*, be less than the estate in the premises, the *habendum* is repugnant and void: or where the estate in the premises, requires a ceremony to its perfection, and that in the *habendum* none—there the estate in the *habendum* takes effect by the delivery of the deed only, and is not void for repugnancy. The provisional clause in this deed is not an *habendum*, and the bare saying this, is sufficient to shew the inapplicability of the case cited to that now under consideration. But say it is an *habendum*, it gives no less an estate than that contained in the premises—they are both estates in fee. The only difference is, that the one is to commence *in futuro*, the other presently; the proviso and the preceding parts of the deed are both parts of the same deed, and both to be taken into con-

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by the rule of law it must have effect from the time of its delivery, or not at all. If it had effect in the present case from the time of delivery, the estate of John, the younger, whatever it was, passed to him from that time; and that must necessarily have been an estate of freehold to commence *in futuro*: or if the deed had no effect at that time, the estate did not then pass; and as the deed can never hereafter have any effect, no estate at all passed from the grantor—and so either way the estate intended, that is to say, an estate of freehold *in futuro*, is void. But to view this case in its proper light, the proviso in this deed is a condition. The word proviso is peculiarly appropriated by law, to create a condition. *Litt. sec. 328, 329. 2 Rep. 70 b, et seq. Dyer 311. Cro. Car. 128.* And as it is a condition to take place prior to the estate intended to be conveyed to the grantee, it is a condition precedent, tantamount to the same thing as if the party had granted the estate in fee, upon condition that it should not take effect until after the death of the grantor and his wife. And with respect to conditions, the law is, that if the condition be subsequent, to defeat an estate already created, and repugnant to law, it is void, and the estate shall be absolute. But if it be a condition precedent, to be performed before the estate can vest, and be repugnant to law, it can never be performed; and for want of a performance, the estate by the very terms of its creation, can never arise—Such condition cannot be dispensed with as a nullity—it is a part of the contract, a *sine qua non*, and its illegality will have the effect of preventing the estate from arising. *Shep. Touch. Pre 129 Co. Litt. 206. Cro. Eliz. 864. 2 Bl. Com. 156. 1 L. Ray. 662.* If this be a condition precedent, it is also a condition repugnant to law, as the scope and view of it is to make a freehold estate pass immediately, and commence in possession *in futuro*, and must therefore have the effect of defeating the estate of the grantee forever. The deed in question, is not a feoffment, conveying a present estate with a repugnant proviso or *habendum*; for it is expressly found he died seised, which proves the immediate freehold was not conveyed, nor delivered over to the grantee, without which, or the circumstance of livery of seisin, as it is called, there can be no feoffment.

His not giving up the possession to the grantee when the deed was executed, together with the proviso, is a full proof that it never was intended to operate as a feoff-

Mar. 1796. ment. It cannot be made to operate as such without open violence to the intent of the parties. It is a conveyance under the statute of uses—in which case the proviso is good so far, as that it must be considered in forming a construction upon the deed; and in that view it will appear to be a condition, to have effect prior to the commencement of the estate of *John Sasser*, the younger.—He had not therefore a present estate, but an estate to commence *in futuro*—and the condition upon which it depended being repugnant to law, as it attempts to make an estate of freehold to commence *in futuro*, and bring therefore legally unperformable, the estate dependant upon it, namely the estate in *John Sasser*, the younger, can never arise nor take effect. The consequence of this is, that *John*, the elder, notwithstanding this deed, had the estate in fee in him as before the execution of it, and a right to make a conveyance to his daughter of that estate; which he has done as stated in the special verdict, by the one or the other of the deeds there mentioned.—The former deed they say is defective—it is not necessary for us to enquire, whether it be so or not—the other deed to her is clear of that and of all other objections—and will pass the estate to the daughter though the other deed be defective.

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Gen. Davie—The words of the proviso are, “Provided that this deed shall not take effect during the lives of the grantor and his wife, but the premises shall remain to the use of the grantor for his life, and then to his wife for her life.” This deed is either a deed of feoffment at the common law, or it is a covenant to stand seised; and if it be a feoffment, the proviso is void. First, it may be a feoffment at the common law—the words here used are well adapted to that instrument. There is no proof, it is true, of any livery of seisin, but immediately after this transaction the grantee, or the feoffee, as I would call him, was in possession, and continued in possession to the day of his death; which is tantamount to a proof of livery and seisin—and beside, our act of 1715 dispenses with livery and seisin in case of deeds of feoffment, provided the deeds be registered in due time—and considering it in that light, the proviso is clearly void, because repugnant to the preceding part of the deed, which conveys a fee unrestrictively. It is argued by *Mr. Taylor*, that the provisional clause in this deed, is a condition pre-

cedent and against law—it is not a condition but a limitation. *Co. Litt.* 201. A condition is a quality annexed to an estate, whereby it may either be defeated or enlarged, or created upon an uncertain event, no part of which definition agrees with the provisional clause in this deed. It is not to defeat, enlarge or create the estate upon an uncertain event which may or may not happen—the estate in all events is to remain a fee, nor is it upon any event to be defeated; neither is the life estate in the grantor and his wife, to be defeated upon any event whatsoever. Nothing is here left to chance or future occurrences, every thing is unalterably fixed—then if this be a common law conveyance, the proviso is a limitation repugnant to the estate granted in the former part of the deed. *Shep. Touch.* 129. *Mr. Taylor* seems to suppose that the word proviso, *ex vi termini*, makes a condition, that is not so—it may be a limitation, covenant, condition, reservation, &c. *Co. Litt.* 203, *a* and *b*, 204. 2 *Re.* 72. A proviso to restrain the generality of the former clauses, is not a condition—whether it be a condition or not, depends upon the true construction of the deed, and the consequences that would result were it held to be a condition—if these were such as would defeat the true meaning of the contract, or not promote the ends it had in view, it shall be construed to be something else rather than a condition—as a covenant, limitation, or the like, that will effectuate these purposes. As to its repugnancy—if it be a proviso repugnant to law, it is void, *Fearne* 178, 179 *et seq.* Or if it be contrariant in itself; or allowing it to be a condition, it is void and against law if it attempts to defeat only part of the estate to which it is annexed. 1 *Re.* 85 *b*, 86 *b*. For if a condition at the common law could make an estate cease as to one, and revive as to another, for a particular time, the breaches of such conditions, which in their nature are secret and not notorious acts, might privately transfer the freehold from him who had taken it by a notorious act as livery of seisin, or the like, to some other person; and again, by a like secret breach, from him to another—so that he who wished to bring a *præcipe*, would never know against whom to institute his suit, nor the lord whom to call upon for his services. If it could be made to cease for a time, and revive again afterwards, then it might be made to cease during the minority of heirs, and by this means

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the wardship be lost to the lord. Such secret modes of estates, from one to another, are against the whole policy and fundamental principles of the common law, which ordained all transfers of real estates to be by open and notorious ceremony. Furthermore, if it be a proviso or condition calculated to deprive the holder of the estate of the exercise of some power which the law annexes as an incident or quality to the estate from motives of policy, as a proviso or condition not to bar an estate tail, it is void. *Shep. Touch.* 130, 131, 132. *Litt. sec.* 723, and the comment upon *Litt. sec.* 360, 361, 362. An *habendum* is a material part of the deed, as it performs the office of describing the estate, or quantity of interest the grantee is to have, and where it is repugnant to the premises, it is void—much more shall a proviso coming both after the premises and the *habendum*, be void, when repugnant to both: and that it is void in such case, is abundantly proven by *Cro. Jac.* 282. *Cro. Eliz.* 255. 1 *Re.* 47. 5 *Re.* 12. 9 *Re.* *Sunday's* case. 1 *Re.* 86. But grant that the proviso in the present case is not void—still if it can be so construed, as legally to carry into effect the intent of the parties, without violating any rule of law, it must be so construed—and here, the manifest meaning of the parties may be effectuated consistently with the rules of law, by construing this deed to be a covenant to stand seised. 2 *Bac. Ab.* 498. 3 *Dyer* 272. *Cro. Car.* 366. 1 *B. Ab.* 410. 5 *Bac. Ab.* 362. 7 *Re.* 13 b. 1 *Bac. Ab.* 176. 5 *Bac. Ab.* 351. *Cow.* 600. *Hob.* 287. A covenant to stand seised of an estate to commence *in futuro*, is good; for so much of the ancient use that was in the covenantor, and which is not conveyed out of him, remains still in him—and in the present case, if the proviso had not been inserted, but the deed had conveyed to the grantee an estate after the lives of the grantor and his wife, there would have remained in them a life estate sufficient to support the future interest of the grantee—and surely if the law would have implied this without the help of the proviso, a proviso express to the same purpose, will not prevent the deed from receiving the same construction, *utile per inutile non vitiatur—expressum non facit tacitum cessare*. As to the place occupied by this proviso, being the latter part of the deed, that is totally immaterial—no matter where it is placed, the construction must be made upon all that appears on the face of the deed—and

the law in making the proper construction, will assign Mar. 1796.
 to each member of the deed, the station and precedence
 it ought to possess, though it may have been misplaced
 by the inattention or unskilfulness of the drawer. The
 true meaning of the instrument is to be collected from the
 whole contents, without regard to the order in which the
 several clauses are actually placed. According to this
 arrangement, the true meaning of this deed will be, to
 stand seised, first to the use of the grantor for life, and
 the life of his wife, and afterwards to the use of the gran-
 tee in fee. Every part of this meaning is clearly expres-
 sed in some one or other of the parts of this deed, and
 when you refer them to the several periods when they
 are to take effect, they necessarily assume this order.—
 There can no reason be given, why the deed should not
 be so construed, and if it be so construed, every objection (270)
 to its validity and legality immediately vanishes—so that
 whether it be a feoffment at the common law, or whether
 it be taken as a conveyance to uses, in either case the
 Plaintiff is entitled to recover.

Judge STONE—I am satisfied judgment ought to be given for the Plaintiff—this is a covenant to stand seised.

Judge HAYWOOD—I am also satisfied in my own mind, that judgment ought to be given for the Plaintiff; but I have reasons for declining to give my opinion judicially, unless it shall become absolutely necessary. I was formerly applied to, while at the bar, for my opinion on this very deed; and after consideration gave the same I now entertain:—Let it lie over till next term. Judge MACAY will then be here:—if he should be of the same opinion with the Judges now present, judgment will of course be entered for the Plaintiff.

NOTE.—The reasons of the Judges now present, were not founded upon the arguments about repugnancy—no part of a deed is repugnant but that which cannot consist with the other parts, unless we speak of a repugnancy to rules of law. It is by no means inconsistent with an estate in fee in remainder, that another should first have an estate for life—neither is it necessary to inquire, whether the deed in question, was intended to operate as a deed at common law, or under the statute of uses; for whether intended as the one or the other, if it could not operate effectually in the way intended, it will operate in some other way in which it may be effectual. There can be no doubt of this rule. A deed intended to operate as a feoffment, may be construed a covenant to stand seised. 1 Atk. 8. H. B. R. 614. There cannot be the least doubt, but that a covenant to stand seised to the use of another, after one's own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the mean time,

Mar. 1796. sufficient to support the future estate. *Co. Litt.* 22, b. This has been already decided in a vast number of instances. There is no point better established by authorities. 1 *Mo.* 175, 178, 98, 159, 121. 2 *Mo.* 207. 3 *Mo.* 237. 2 *Ves.* 255. 4 *Mo.* 149. 2 *L. Ray* 855. 1 *L. Ray* 34. There can be no doubt in the present case as to what was the meaning of the parties, and the only question is, whether it is possible to put such a construction upon the deed, (*Vide* 1 *Nels. Ab.* 487. 488, s. 16, 17, 18, 19, 20, 22. 3 *Nels.* 96, s. 18. *Fearne on Cont. Rem.* 30 33,) as to make that intent consistent with the rules of law: and if the law will imply an estate for life in the grantor, where nothing is said about it, in order to support the estate in remainder, surely it will not reject such estate when raised by the express words of the parties. Here that is done, and besides, the very case now before the court was decided not long since, and is reported in 4 *Term* 181. There, there was a conveyance exactly like the present, and a proviso of exactly the same import, placed in the same part of the deed; and the court decided it was not a repugnant proviso, but consistent with the estate granted in the deed, and that the estates mentioned in the deed were well raised. *Vide* 1 *Nels.* 408, s. 22. 1 *Rep.* 101, 154, b.

September term, 1796. This special verdict was again argued before Judges MACAY and STONE, and they gave judgment for the Plaintiff.

(271) NOTE.—It will not be improper here to observe, that this opinion of three of the present Judges—founded upon consideration, after argument by counsel, upon a case made by a special verdict, is directly against that of *Ward* and *Ward*, decided as to this point at Halifax, April term, 1793. That was an Ejectment cause, upon the trial of which, a question arose upon a deed of bargain & sale, made to the lessor of the Plaintiff by his father in the year 1771, of the premises in question, which conveyed the whole estate absolutely to the bargainee; but in the premises of the deed, there is an exception of the grantor's lifetime, in any part or parcel of the land—whether the lessor of the Plaintiff took a fee by this conveyance, as a life estate was reserved to the grantor, was the question.

* *Davie*, for the Defendant, laid it down as an established rule of law, that a fee cannot be created by deed to take effect or arise *in futuro*; and here, he said the grantee was not to take till after the grantor's death. The Attorney-General, *Haywood*, entered into a discussion of the doctrine of uses, to shew that the use might be limited to take effect in this manner by the statute of uses, although it would not have been good at the common law.

Per Curiam.—ASHE and WILLIAMS, to the Attorney-General, we differ with you in opinion in respect to the operation of the statute of uses, but we are clearly of opinion, that here the fee immediately passed to the grantee, and that the reservation is void.

v. Stanton.

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Notice need not be given under the act of 1762, *Rev. c. 70, s. 3*, to the drawer, if he has no effects in the hands of the drawee. The receipt of part of the money from the drawee does not discharge the drawer, and as to the balance he is entitled to notice only when he would be so in case of the whole's being unpaid.

The case was, one man drew an order on another, in favour of a third, and soon after moved away to another State—the drawee paid part, and refused to pay the residue, and it was protested as to that part. Three or four years afterwards, the drawer returned, and was sued for the balance, the money being first demanded of him by the payee. It was argued for the Defendant, that by 1762, *c. 9, s. 5*, the drawer ought to have had notice of the refusal to pay in a reasonable time—the words of that section being, “that no person or persons whatsoever, shall prosecute any suit against any person or persons who shall give such order, for the money therein mentioned, before the same shall have been first protested for non-acceptance, & notice given thereof to the drawer before such suit shall be brought; and if any suit shall be brought on any such order, before notice and refusal to pay as aforesaid, the Plaintiff or Plaintiffs shall be nonsuit, and pay costs;” and for want of such notice he is discharged.—Also a receipt of part from the drawee, is a giving of credit to him, and discharges the drawer.

Per curiam—Where the drawee has no effects of the drawer in his hands, there is no necessity for notice of non-acceptance to the drawer; for he must know without notice that he had no effects in the other's hands, and the design of notice is, that the drawer may be warned in time to get his effects out of the drawee's hands—of course, where there are no effects in the hands of the drawee, such notice is useless and vain. As to the receipt of part from the drawee—that is for the benefit of the drawer, as it discharges so much of his debt due to the payee. This was formerly held otherwise, and even now where the drawer may sustain a loss for want of notice of non-payment of the balance, he must have that notice. Notice, however, of non-payment of the balance, cannot be necessary, where notice of the whole would not be so. The fourth clause of the act of 1762, *c. 9*, makes notice necessary only in cases of an order drawn, directing money in the hands and possession of a second,

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Apr. 1796. to be paid to a third person—the notice directed by this act, is confined to such orders only—this is not such an order, if there was not any money in the hands or possession of the drawee, so far as regards the balance.

NOTE.—*Vide Pon's Ex'rs. v. Kelly*, 2 Hay. 45. But see *Austin v. Rodman*, 1 Hawks 194, in which it was held, that the drawer of a bill of exchange was entitled to notice of its dishonor, though the drawee be not indebted to him either when the bill was drawn or fell due, provided the drawer had reasonable ground to believe that it would be honored: and a written authority from the drawee to the drawer to draw is sufficient ground. See also 2 Am. Ed. of 2 vol. *Philips on Evidence*, 37, 38.

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Hagan v. Paine.

A consignee was instructed to exchange the consigned produce for that of Surinam; when he arrived there, he found it impracticable to make the exchange for any thing but Sugar and Coffee, which were contraband by the law of that country; but still such kind of traffic was usual, and the law had not been enforced against it for many years. The consignee ventured to make the exchange for the contraband articles, but owing to an attempt to enforce the law, he had to resort to a subterfuge, in the doing of which, some of the Sugars were damaged: *held*, that he was not responsible for the loss.

Case. *Non assumpsit, &c.* pleaded. The case upon the evidence was this: *Hagan* had shipped on two vessels of the Defendant, destined to Surinam, seventeen hogsheads of tobacco and forty barrels of pork, consigning them to *Paine*, for him to exchange them for goods of the production of Surinam, to be brought in return to this State. The vessels and cargoes arrived safely at Surinam, but the cargo could be sold for nothing but the paper currency of that country—neither molasses nor specie could be procured for it—it could be exchanged for nothing but sugar or coffee, each of which was contraband by the law of that country, but were notwithstanding, usually and commonly purchased by the ships and vessels of all nations resorting thither, and there had been no instance of a seizure or information lodged with the officers of the government for many years—the tobacco was exchanged for sugars—and after they were shipped, a vessel in the harbor laden with sugar, was seized—it

then became necessary to re-land the sugars, and have them conveyed to another part of the sea coast, and for the Defendant's vessels to depart as if for their homeward voyage, and to return secretly and take in the sugars.— All this was done, and about one half of the sugars were lost in the operation, getting wet when put into the flats—the vessels took in the sugars in this damaged state, and carried them to Guadaloupe.

Counsel for the Plaintiff—A factor, agent or consignee ought to pursue the directions given by his principal with respect to the goods committed to his care—if instructed to sell for ready money, or to sell generally, which is for ready money, he cannot sell upon credit, without running the risk himself—if he fails to pay customs in a foreign port, he runs the risk of the forfeiture if any should ensue thereupon—if he attempts to transport goods prohibited to be exported, and his own government should seize the goods, the loss is his own. 2 Mo. 100. Vide 3 P. Wil. 185, 187, 279. Cow. 255. (279)

E contra—It was argued, that though in general the law is as stated on the other side respecting factors or consignees, and their consignments, yet sometimes *impotentia excusat legem*. Exceptions may be made to this general rule where the Defendant, the consignee, proves to the satisfaction of his jury, that it was impossible to comply with the terms of the commission given by his principal; if he cannot sell for ready money, when empowered to sell; and that is implied in the case in 2 Mo. 100. where one of the reasons rendered by the court for their judgment, is, for that he did not plead he could not sell for ready money, implying if this had appeared to the court, then judgment would have been different. By parity of reason, if he could not exchange the consigned goods for goods of the country that were legally exportable, though in general he ought not to exchange for contraband goods; yet in a case like the present, where such goods in the common course of trade were usually and generally purchased, and it was generally thought not to be unsafe to purchase them, there ought to be an exception from the general rule—and of that opinion were the court—and there was a verdict for the value of the sugars saved, and judgment.

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Black, Assignee of Blanchard, v. Bird.

A negotiable instrument in the hands of an assignee is not subject to any payments that do not appear endorsed, if it was assigned before, or at the time it became due: but if it was assigned after it became due, then all such payments, as it can be presumed, the assignee had notice of, shall be good against it. An assignor and assignee are both members of the same firm; a bill is made payable to the assignor, expressed to be for a debt due the firm: a payment to the company will be a good payment against either the assignor or assignee members of that company.

(274) Action upon a bill sealed, for two hundred and forty-two pounds sixteen shillings and ten pence, Virginia money, payable by *Bird* to *Blanchard*, twenty days after sight; expressed to be for a debt due from *Stuart* to *Blanchard & Co.* and dated in May, 1792. A Clerk of *Blanchard* received 248 barrels of tar, at the rate of six shillings, Virginia money, per barrel; and in March, 1793, *Blanchard* received from *Stuart* 1500 bushels of salt, at three shillings per bushel; in all, amounting to about the sum mentioned in the bill. *Black* was a partner of the company of *Blanchard & Co.*; the endorsement of *Blanchard* was blank, so that it did not appear when the assignment to *Black* took place; but a letter from *Black* to *Bird* was produced, dated January, 1794, which informs *Bird* that he, *Black*, had the bond in possession, and required payment. Upon this evidence, the cause was argued at the bar at great length on both sides.

Et per curiam.—This bill hath been discharged by *Stuart* in the deliveries of salt and tar, proven in the cause. The question is, as these deliveries were not endorsed, nor the bond taken up, whether they are to be considered as a good payment as to *Black*, the assignee. As to which, the court is of opinion, that this bill is a bill belonging to *Blanchard & Co.* though made payable to *Blanchard* only. It is expressed to be for a debt due to the company, and is given to a partner as one of the company. *Blanchard* is only in the nature of a trustee for the whole company; his act is binding upon the whole company. The company after this transaction, could not support a suit upon the open account against *Stuart*.—Then the payment having been made to a Clerk of *Blanchard*, it is a payment to *Blanchard*; and a payment of a partnership debt to him, being one of the partners, binds the whole partnership; and *Black*, the assignee, is one of

them: wherefore the payment is a good one as to *Black*, Apr 1796.
 the present Plaintiff. Secondly, supposing this not to have been a partnership bond, but to belong to *Blanchard* only, having been made payable to him only; yet, the circumstances of this case render it probable, that the assignment was not made till after the payments, probably not till sometime about the beginning of 1794: and then this bill was assigned a year and six months after it was payable. If a paper be assigned at the time it is payable or before, and no payments endorsed, the assignee will hold discharged of all payments that may have been made previous to the assignment; but if that be made after the day of payment, then the jury are at liberty to take into consideration any circumstances from whence they may reasonably presume, the assignee knew of the payments. The presumption is strengthened in proportion as the time of the assignment is at a greater or shorter distance from the time of payment, and in the same proportion these collateral circumstances will have the greater or less weight. In the present instance, a great length of time has intervened, and therefore a slight circumstance will do, to raise a presumption of notice of these payments in the assignee. After such a length of time, why did not *Black* make some enquiry of *Mr. Stuart* respecting this bill, before he took the assignment? Had such enquiry been made, he would not have taken the assignment at all. The length of time was enough to put him upon enquiry, yet he made none. Add to this, that from his situation and connexions with *Blanchard*, it may be presumed he might have known something of the transactions, had he taken proper pains. If the jury believe he might have had knowledge of the payments by enquiry, then they should find for the Defendant—otherwise, for the Plaintiff. They found for the Defendant.—
 Cases cited, 3 D. & E. 81. H. Bl. Rep. 89.

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NOTE.—Vide 2d. Am. Edit. of the 2d. Vol. of *Philips on Evidence*, p. 14, in the note where, the law relative to negotiable instruments in the hands of an assignee, is discussed; and the distinction taken in this case, is fully supported by many authorities, both English and American.

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Whitbie's Administrators v. Frazier.

If the husband dies before administration taken upon his wife's *chose in action*, her administrator, and not his, is the proper person to administer them: but the husband's representative will be entitled to the surplus after payment of her debts.

Debt. The mother made a gift of the negro in question to *Sarah*, the daughter, to take effect in possession after the death of the mother. *Sarah* married and died, and then the mother died. The husband surviving, and last of all the husband died, without taking administration to his wife. The administrator of *Sarah* now sues for the negro. It was objected, that the property in the negro passed into the husband upon the death of the wife, he being her next of kin; that he was entitled to administration, and was not liable to make distribution; and though he died before administration taken out, that cannot prejudice him with respect to any right he had as next of kin—that his wife's personal estate, not yet reduced into possession at her death, vested in him as a legacy, or as a distributive share, that will go to the representatives of the sharer; and that as this was a vested interest in the husband, his representatives succeeded to his rights, and not the representatives of the wife: and therefore they, and not the representatives of the wife, are entitled to this action—and for this were cited 1 *Wils.* 168. 3 *Atk.* 537. *Lovel.* 73, 82, 85. *Pre. ch.* 21, 260. 3 *P. Wil.* 443. The court took time to consider, in order, as they said, that this cause might be specially made up for the further consideration of the Judges, should the objection appear upon further reflection to be of weight enough to raise a serious doubt; and after some days consideration they gave their opinion.

Per curiam—It is not necessary to make up the special case; this action was formerly brought by the administrator of the husband, and determined by two Judges to have been improperly brought for that very reason.—One of the court now present, on hearing this matter first moved, was inclined to think the action should have been in the name of the administrator of the husband, but upon further consideration, he is convinced of his mistake; and it was occasioned by not distinguishing between the right of property, and the right of action.—It is a true position, that the property of this negro was

vested in the representative of the husband, in the same manner as a legacy is vested in the legatee, or a distributive share in one of the next of kin, who if he dies will transmit his share to his representative—in this case the husband was entitled as next of kin, and not as husband, and by his death hath transmitted the right he had to his representative—that was only a right to demand the negro of the administrator of the wife after debts paid.—No person is entitled to receive this negro in the first instance, but only as administrator of the wife, to the end that her property in the hands of her administrator may be subject to the payment of all just debts contracted by her *dum sola*—the husband was indeed entitled to be her administrator, but he did not apply; another might be appointed, who will be a trustee for the husband as to all that part of the wife's choses in action, that such administrator shall recover or get in above what will satisfy her debts. This administrator is entitled in the first place to the possession of all her choses in action, and is accountable to the husband, or the representatives of the husband, in the same manner as he would be accountable in other intestacies to a distributive sharer and his representatives—so it would be of no use to make up this special case, all the Judges of the State being of this opinion—the other Judges now upon the other circuit, having decided this very case before; and the two now present, being of the same opinion. So the Plaintiff had judgment. The court relied upon *Co. Litt.* 351. *H. B. Re.* 538.

NOTE.—*Vide Toller's Law of Executors*, 116 & 217, where it is said that although it was formerly held that if the husband dies before taking out administration upon his deceased wife's choses in action, his representative will be entitled to administer them, yet, it is now established that her next of kin in such case is entitled to the administration, but he will be accountable to the husband's representative for the residue of the property after payment of debts &c. 1 *P. Williams* 382. *Har & But. Co. Litt.* 351, a note 1. 4 *Burn. Eccl. Law*, 235. See also *Neale's Adm'r. v. Haddock*, *Con. Rep.* 75.

Murfree v. Redding.

Making a man master, and giving him command of a ship is, *ipso facto*, giving him power to take a load for freight in a foreign port; and his contract in such case, binds the owner.

Bill in Equity and answer. *Redding* had recovered judgment against *Murfree* for a negro—*Murfree* com-

Apr. 1796.

plained, and stated in his bill, that *Redding* had put one *Scranton* on board his brig, as master, and sent him with a load from Newbern to Murfreesborough, and that he had put the negro on board with him, and authorized *Scranton* to sell the negro. This the answer denied.—The bill further stated, that *Scranton*, whilst at Murfreesborough, took in for freight a load of tar for him, and a *Mr. Figures*; and had never accounted for it; and that *Redding*, as owner, ought to be liable. The answer (277) denied that *Scranton* was appointed master for any other or further purpose, than that of navigating the vessel from Newbern to Murfreesborough, and back, and if he had taken in a load upon freight at Murfreesborough, he did it without any authority or permission from him.

Per curiam—A master has a right to make such contracts, and usually is the person who does actually make them—the owners cannot be in every part where the ship goes to make them. The very making a man master, and giving him the command of the ship, is a giving him power to take a load for freight in a foreign port, or in a port at a distance from the place of the owner's residence. His appearing as master, is enough for any man to contract with him upon the credit of his employer; and as it appears in the present case by the statement of *Redding* himself, that the cargo was lost by the attempt of *Scranton* to cross the bar without a pilot; and as the rule *respondent superior*, is here applicable with great propriety, therefore let the injunction be dissolved as to all but the value of the load of tar; and as to that, let it be continued until the hearing. Books cited—*Moll. b. 2, c. 1, s. 5 and 6. Moll. b. 2, c. 2, s. 14. 1 Term Rep. 75, 78. Lex. Merca. 95. Sid. 411. 2 Ch. C. 238.*

NOTE.—*Vide Howard v. Ross, 2 Hay. 333.*

Den on the demise of Lane, v. Rebecca Davis.

The act of 1784, *Rev. c. 204, s. 5*, will bar a remainder dependant upon an estate tail, in possession of tenant in tail, at the time of passing the act.

Ejectment. Upon the trial of this cause at the last term, the jury found a verdict subject to this question of law, whether the act of 1784, *c. 22, s. 5*, for docking entails, could bar a remainder dependant upon an estate tail,

in possession of tenant in tail at the time of passing the act. If it could, they found for the Defendant; if it did not, then the verdict to be entered for the Plaintiff. Apr. 1796.

At this term, it was argued by *Mr. Hamilton*, that the Legislature of North-Carolina had no power to pass any law having a retrospective view. The Bill of Rights, which is a part of our Constitution, *sec. 24*, expressly negatives the power of passing *ex post facto* laws. The act in question, not only forbids the making estates tail after the passing the act, but also attempts to bar and do away all such entails in remainder as existed, and had been legally created before the passing of it. The 43d article of the Constitution, enables the future Legislature to regulate entails, in such manner as to prevent perpetuities. It gives them no power to destroy rights that had been acquired legally, by means of entails prior to that time. It was not only against reason to give retrospective operation to acts of the Legislature, but the common law is expressly against it. 19 *Vin. Ab.* 4 *Ba. Ab.* 637. 2 *Mo.* 310. 2 *Shore.* 17. *L. Ray*, 1352. 5 *Bac. Ab.* 407. 4 *Burr.* 2161. 19 *Vin.* 344. 10 *Rep.* 55. *Standon v. Morgan*, in *Plow. Com.* 1 *Salk.* 198. (278)

Curia advisare—And a few days afterwards gave judgment for the Defendant.

HILLSBOROUGH, APRIL TERM, 1796.

Lewis v. Hynes.

Old *Lewis* devised negroes to his wife for life, and after her death, to his children equally. One of the daughters married *Lewis*, who died in the lifetime of his wife, and of her mother, the widow of the first *Lewis*; then the mother died, and the widow of the latter *Lewis* married *Hynes*. The question was, who was entitled to these negroes, the executors of the latter *Lewis* or *Hynes*, the second husband.

Per curiam—*WILLIAMS* and *MACAY*, it was (*ut audi-vi*) decided in favor of the executors of *Lewis* upon argument. *Quære*—The authorities upon which this decision is grounded, *Fearne* 440. 9 *Mo.* 101. 2 *P. Wil.* 608—only prove that the husband may dispose for valua-

Apr. 1796. able consideration, and that equity will protect such assignment. 1 *P. Wil.* 566. 3 *P. Wil.* 411. *Fearne* 446, 447. *Co. Litt.* 46 b. 10 *Rep.* 51 a. 1 *Salk.* 336—will none of them support this decision; neither does *H. Bl. Rep.* 538, for though a vested interest in remainder, was there held to vest in the husband, that was the case of a chattel real; and 2 *Atk.* 124, and the authorities cited in *Whitbie v. Frazier*, prove that vested interests in the wife, not reduced into possession, do not go to the husband as husband, but as next of kin to the wife where he survives her—whereas if they went to him as husband, because vested interests in the wife, there would be no occasion to claim them, nor indeed could he claim them as administrator of the wife—these negroes were but choses in action of the wife of the latter *Lewis*, which the first husband had never reduced into possession; and as she in fact had not become entitled to the possession till after the death of the mother, which was subsequent to that of her husband, the action in her right, commenced only from the death of the mother; so that during the life of the first husband, he could not even sue or demand the negroes in right of his wife; and it seems difficult to imagine how the executors could acquire these rights, which the person they represent had not. *Ideo quære de hoc.*

NOTE.—It will be seen that the Reporter doubts of the decision in this case, and it seems, from the case of *McCallop's Ex'rs. v. Blount & Wife*, *Con. Rep.* 96, that his opinion was correct. In *Sarah Neal's Adm'r. v. Haddock*, also, the Judge (*TAYLOR*) says it is perfectly settled that the husband is not entitled to the remainder of a chattel belonging to the wife at the time of the intermarriage. This case is reported in 2 *Hay.* 183, and it seems that *HAYWOOD* had then changed his former opinion and seemed disposed to consider that where a wife has a vested remainder, it becomes the property of the husband by the marriage, although it may not vest in possession during the life of the wife. It is well settled that if choses in action belonging to the wife are not reduced into possession during her life by the husband, he is entitled to administer them, and if he dies before administration taken out, his representatives will be beneficially interested, though it seems the wife's next of kin can claim the administration. From *Con. Rep.* 75, it appears that the administrator of *Daniel Neal*, who was the husband of *Sarah Neal*, (mentioned in the case above from 2 *Hay.*) and who survived her, brought an action against *Haddock* for the same property, but the court held in accordance with *Whitbie* and *Frazier*, *ante* 275, that the wife's representative must bring the action, but that he would hold as trustee for the husband's representative.—The case from 2 *Hay.* shows that such an action was brought and a recovery had thereon. But if *HAYWOOD's* latter opinion be correct, and it is certainly very strongly supported by *Roberts v. Polgreen*, 1 *H. Blach. Rep.* 535, the case in the Court of Conference, and *Whitbie's*

Adm'rs. v. Frazier, ought to have been decided differently upon the Apr. 1796. ground that the wife's interest was not a chose in action, but a vested interest. Slaves hired out at the time of marriage are choses in possession and vest in the husband though he may die before the time expires for which they were hired. *McLean's Adm'r. v. Taylor's Ex'r.* 1 Dev. Rep. 310. *Frazier's Ex'r. v. Mhoon & Wife*, *ibid.* 456.

HALIFAX, APRIL TERM, 1796.

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Minge v. Gilmour.

Tenant in tail sells land in 1778, and dies leaving a larger estate of land to his son, the present Plaintiff: he is bound by the warranty of his ancestor and assets descended. He is also bound by the express words of the act of 1784, *Rev. c. 204, s. 5.*

Old *Minge* held this land in tail; in 1778, he sold to *Gilmour*—then died, leaving lands, of eight or ten thousand pounds value, to his son, the present Plaintiff, who is the heir in tail.

Per curiam—After much argument at the bar, he is barred by the warranty of his ancestor, and the assets descended to him, being of as much and indeed greater value than the lands in tail. Secondly, he is barred by the express words of 1784, *c. 22, s. 5*, that declares all sales and conveyances made *bona fide*, and for valuable consideration, since the first day of January, in the year 1777, by any tenant in tail, in actual possession of any real estate, where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant or tenants in tail, and tenants in remainder, of and from all claim and claims, action and actions, and right of entry whatsoever, of, in and to such entailed estate, against any purchaser, his heirs, and assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee. But as to the warranty, the Plaintiff's counsel contended, that warranty and assets cannot bar the estate tail, because that had not been turned to a right before or at the time when warranty descended. He cited *Co. Litt. 388 b.* There was a verdict and judgment for the Defendant.

NOTE.—*Vide Wells v. Newbold, Conf. Rep. 375.*

Apr. 1796.

Bunn v. Moore's Executors.

This case, which had been reserved for the consideration of the court for three or four years last past, now came on to be decided. The court said it was no longer necessary to keep this cause waiting for the opinion of the court, as it had already been considered by the Judges and they had proceeded in consequence of that consideration, to direct in several cases which occurred within the present circuit, how interest should be calculated—that on the Western circuit last spring, Judge MACAY had concurred in giving such directions, or had given them himself. [*Gen Davie*, at the bar, said Judge MACAY had told him his opinion was as the directions had been given this circuit.]

(280) *Per curiam*—The interest must be calculated by the following rule—it must be calculated upon the principal, from the time it commenced to the day of the first payment; if the payment was equal and no more than equal, to the interest then due, it must extinguish the interest; if it exceeded the interest, the balance, after extinguishing the interest, must be deducted from the principal; if the payment was less than the interest, then the balance of interest must remain until the next payment. Interest must then be calculated upon the principal remaining, to the time of the next payment, which next payment must be applied in the first place to the whole of the interest then due; and so *toties quoties*—and in the present case, let the interest be calculated by this rule. And the Plaintiff had judgment. *Vide 4 Term, 613.*

NOTE.—*Vide Anonymous, 2 Hay. 17. North & Prescott v. Mallett, ibid. 151. Yancy's Admr. v. Muller's Ex'r. Conf. Rep. 513.*

Dawsey v. Davis.

Motion to dismiss a cause by the Plaintiff in a *certiorari*, who had been Defendant in the court below, upon the ground that the Plaintiff in the suit below had not given security in this court for costs, in pursuance of a notice served upon him for that purpose: *Per curiam*, if the suit is now dismissed, we must order the court below to proceed to judgment. Where a cause is removed by *certiorari* granted by a Judge out of court, it must be placed upon the argument docket, and Defendant's affidavits will be received to show the impropriety of granting a new trial. If the *certiorari* be obtained in court upon a rule made upon the other party to shew cause, the case when removed, shall be put upon the trial docket without further argument.

Stated to the court to be a *certiorari* to remove a cause from an inferior jurisdiction, and that a rule had been

made on the Plaintiff in the cause below, to give security in this court for costs; otherwise this cause to be dismissed. It was also stated, that this notice had been served on him, and that he had not given the security required; whereupon the counsel for *Davis*, the Defendant below and Plaintiff here in the *certiorari*, moved that the case should be dismissed. Apr. 1796.

Per curiam—If the cause be now dismissed from this court, a *procedendo* must issue to enforce the execution of the judgment below; because the obtaining a *certiorari* was for the purpose of having it determined by the court here, whether it was proper to grant a new trial, and the judgment below remains in force until an argument be had here, & the new trial granted; and if the cause should be dismissed before the new trial is granted, the obstacle to the execution of judgment being removed, it remains to be executed: and the court here ought to certify the court below of this proceeding, which is done by a *procedendo*. The counsel for the Defendant then moved, that the cause should be set aside for trial at the next term.

Per curiam—When a cause is removed by *certiorari* granted by a Judge out of court, it must be placed on the argument docket; and the affidavits of the Defendant may be received, to shew the impropriety of granting the new trial. The court therefore will not order a new trial, until the affidavits on both sides be received. The affidavits were then produced on the part of the Plaintiff in the *certiorari*—the Defendant had none: but these being not sufficient to grant a new trial upon, the court ordered the cause to stand over for other affidavits, which it was said could be procured.

It was further laid down by the court in this case as the rule of practice, that if the *certiorari* was obtained in this court upon a rule made, on the other party to shew cause, and upon argument had upon that rule, that then the cause when removed, should be placed immediately on the docket of causes for trial, without any further argument to be had; but if obtained before a Judge out of court, then it was subject to the rule above mentioned. (281)

NOTE.—*Vide Anonymous*, post 367. *Reardon v. Gray*, 2 Hay. 245.

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State v. Evans.

Where an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind, which the law requires to constitute guilt, until the contrary is shewn.

Indictment for assaulting one *Joseph Wright Nicholson*; and for that the said *Evans*, on purpose, unlawfully did bite off the right or forefinger of the right hand of him, the said *Joseph Wright Nicholson*, with intent in so doing the said *Joseph Wright Nicholson* to maim and disfigure, against the act, &c. The evidence was, that *Nicholson* applied to him at Nash Court-House, about the middle of the afternoon, to borrow some money; which displeased *Evans*, who said, as he was poor, *Nicholson* intended to insult him. On the same evening after dark, two men, *Williams* and *Viverett*, were playing at cards, and some dispute arose between them. *Nicholson* jocosely said to *Williams*, why don't you whip him; who replied jocosely also, that he was afraid to attempt it—*Nicholson*, in the same strain, offered to bet a dollar that he could flog *Viverett*; whereupon, immediately, *Evans* stepped forward, saying, he would accept the offer, pulled a dollar out of his pocket, and was handing it to one *Woodward* as a stake-holder. *Nicholson* snatched the dollar, and put it in his pocket—*Evans* demanded it—*Nicholson*, continuing the joke, said he had no money of his—*Evans* still demanded the money, and not having it delivered, proceeded to say, you act like a scoundrel.—*Nicholson* replied, you can't make me so. *Evans* answered but I can flog you, and came up to *Nicholson* in an angry manner. *Nicholson* said, I will not fight you myself, but I have a negro fellow shall fight you. This exasperated *Evans* to a great degree. He came up several times offering to strike *Nicholson* continuing each time to say he would take the law of him. At length *Evans* stepped off a little way, pulled off his clothes, and came up again; upon which *Nicholson* took hold of his arm to turn him off, and when he was turned, struck him: upon which the blow was returned, a fight ensued, and immediately *Evans* bit off the finger, as stated in the indictment.

(282) *Per curiam*—Whenever an act of an outrageous kind is committed, and in order to its being punishable, the law requires a certain disposition of mind to accompany

it. The act being once proved to be committed, the law Apr. 1796. will presume it done with that disposition, till the Defendant shews the contrary—as in the case of killing, that being proved, the law will presume it was done with malice prepense, till the contrary be shewn by the evidence; so here, the law requiring the act of biting off the finger to be done on purpose, unlawfully, and with intent to maim, when the act itself is proved, the law will presume it was done on purpose, and with intent to maim, as it actually was a maim, till the evidence sheweth the contrary—such as that it was done by accident, or done in such a manner as was not likely to be attended with that effect; or that the act done was in pursuance of some office or sentence of the law, as slitting the nose, in the case of a conviction and judgment of forgery, by the proper officer; or that it was done for the necessary self-defence of the party, against some great bodily harm attempted by the person maimed, and that there was no other means of preventing the mischief, or other circumstances of the like kind. No such circumstances of excuse or justification have appeared on the evidence in the present case. Had *Nicholson* made the first assault, perhaps it might have justified the other in beating him, but it could not justify a maim. *Nicholson's* behaviour in the present case was surely very improper, but the Defendant has carried his chastisement too far. This is a practice that ought to be discouraged, and if a sudden rencounter shall be deemed sufficient to excuse the party maiming, from the penalties of this branch of the act, it will be of very little avail; for then in every sudden affray, the one party may bite off the nose, fingers, &c. of the other, and excuse himself by saying it was done in the heat of passion, upon a sudden affray. And though *Nicholson* would have no right to complain, had he received a gentle scourging from the Defendant; yet the other party being a man, as the evidence is, of very superior bodily powers, there cannot be the least excuse for acting as he has done.

The jury convicted the Defendant, and he was fined five pounds, and sentenced to six months imprisonment, according to the act of Assembly.

NOTE.—Vide *State v. Irwin*, ante 112.

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Sherrod v. Davis.

If in an action against two Defendants for a joint contract, one of them cannot be taken; after the *pluries* writ, the other may be proceeded against alone.

(283) This was an action brought against two Defendants, upon a joint contract. One of them lived out of the State and could not be taken, but the process of the court had been regularly issued against him, to the *pluries* which had been returned *non est inventus*. The Plaintiff then proceeded against the other, and obtained a verdict against him; and it was moved in arrest of judgment, that it was irregular to proceed against *Davis* till the other had been taken. This motion having been placed on the argument docket, came on now to be argued.

Gen. Davie argued in substance—That by the law of England, where one of two joint Defendants could not be found, the Plaintiff proceeded to the outlawry against him, and then declared against the Defendant that was in court, that he, together with the other, took upon himself and promised, &c. See *Stra.* 473. 2 *Atk.* 510. 511. And if in a Court of Equity the process against the absent Defendant, was carried on to sequestration, when it appears the Plaintiff has done every thing in his power, by using the utmost process the law allows to compel the appearance of the absent party, it suffers him to proceed against the other for the whole. By parity of reason, when in this country the court perceives the Plaintiff has used the whole series of process that the law allows him to enforce the appearance of a Defendant, it will, in like manner, allow him to proceed for the whole against the Defendant who is in court. Now by the act of 1777, c. 2 s. 23, when the Sheriff returns *non est inventus*, the Plaintiff may take a judicial attachment, or an *alias* or *pluries* at his election; but the act speaks not of any further process, nor indeed is there any further process which can be used here—the law of outlawry is not in force for want of the proper officers to conduct it. It appears by 5 *Com.* 241—and by *Jacob's Law Dict.* which though not a book of authority, seems to have treated of outlawry much at large, and with considerable accuracy—that there must be *fielazer*, *exigunter*, &c. to make out the process necessary at the different stages of the proceeding. Also

the act which puts in force such parts of the English law as are now in use, says, only such parts of the statute and common law as were before in force & use here and not incompatible with our form of government, shall be still in force. But the proceeding to outlawry was never in force here, and therefore is not a part of our law—and by the 12th section of the Bill of Rights, no man can be outlawed, &c. but by the law of the land; but there is no law in force here for that purpose. If the law of outlawry be not in force here for any of these reasons, then there is no other process that a Plaintiff can use, but that mentioned in the act of 1777, before mentioned; and the Plaintiff having proceeded to the extent of that process, should be suffered upon the principles before stated, to proceed against the other. Apr 1796.

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It was argued by *Baker, e contra*—That this was not such a case, as if it happened in England, an outlawry could have been pronounced upon—that outlawry was the putting *extra legem*, persons who were subject to it, and had taken the oath in the Court Leet, 5 *Com. Dig.* 650, but it was error if pronounced against a subject to another government, and resident out of England, or if out of the realm upon public business—here, the absent Defendant was a citizen of another government, and resided within the limits thereof, so he could not have been outlawed; and if he could not have been outlawed, then according to the argument on the other side, it was not possible to proceed against the other. The reason why they do not in England proceed against the outlaw, being, that his property is forfeited to the King, so that there is nothing for the Plaintiff; but until the outlawry takes place, there is a possibility of recovering something against him as well as against the other—and if the absent Defendant is under such circumstances that judgment of outlawry in England could not be pronounced against him, I apprehend there can be no proceeding against the other until the absent Defendant be actually brought in—for in England they never proceed against the arrested Defendant, till it appears by the outlawry, there is no possibility of making the other enter into the defence with him. Indeed our act of Assembly seems to contemplate no other end of process than the taking the Defendant, for it directs the *alias* and *pluries* to go till the party be arrested. See 1777. c. 2, s. 78.

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Et per curiam—The judicial proceedings of this country have never recognized the law of outlawry previous to the Revolution, and therefore that part of the law of England cannot be considered to be in force here at this day. The words of the act are, that all such statutes, and such parts of the common law as were here before in force and use within this territory, &c. and so much of the said statutes, common law, &c. as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this State, and the form of government therein established, and which have not been otherwise provided for, &c. are hereby declared to be in full force—but this part of the common law having never been used here before the Revolution, cannot within the terms of this act, be now received here as law—though there is nothing in the constitution to repel such a law, should the Legislature think proper to establish it—on the contrary, the constitution admits the possibility of outlawing a citizen. 12th sec. of the Declaration of Rights—No man shall be outlawed but by the law of the land. This implies he may be outlawed *survato juris ordine*. But although a man may not be outlawed here, yet there is the same reason in certain circumstances for allowing the Plaintiff to proceed against one of two Defendants in court, where the other cannot be taken, as if it were the practice to outlaw the absent Defendant. The true reason why in England after outlawry the law allows a proceeding against the Defendant who is taken, is not because the property of the other is forfeited, but because *lex nemini coget ad impossibilia*. It requires both to be sued if possible, that both may bear their equal burthen of the contract they have jointly undertaken to perform. It is for the benefit of the Defendant who is in court and amenable, that this is required. When it appears to the court, however, to be impossible for the Plaintiff to bring both into court, the law will no longer require this of him; for that would be to require an impossibility, and to defeat the Plaintiff of his just demand. Although from the nature of the contract each Defendant was answerable *in solidum*, this would be unjust; and the law does not require it after it hath become evident that the Plaintiff cannot arrest both. In England this impossibility is evidenced by the outlawry, the utmost process that the law knows, and the Plaintiff hath in his

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power to use. So in this country the law will require Apr. 1796.
 the Plaintiff to proceed against both upon a joint under-
 taking, that both may be contributory to the perform-
 ance of this joint contract, until the Plaintiff hath pro-
 cured legal evidence that it is out of his power to enforce
 the attendance of some one of them or more: and by an-
 alogy, this should seem to be effected here by the last pro-
 cess that the law has provided, the *pluries*, or the attach-
 ment, &c. Though this is a point not expressly decided
 in this State since the Revolution, yet the constant opin-
 ion and practice of the bar hath been, &c. and it seems
 extremely reasonable, otherwise one Defendant by with-
 drawing himself, might forever prevent a recovery against
 his co-defendant. This would be a serious mischief in-
 deed. Many Defendants would avail themselves of it
 immediately. Our vicinity to other States, would make (286)
 it the easiest matter in the world to be practised; and a
 decision of that kind would occasion the loss of many just
 debts and demands. If it were necessary in order to sup-
 port this opinion to shew that this is such a case as an out-
 lawry would lie in supposing it to have happened in Eng-
 land, it is sufficient to say, that it is totally immaterial
 whether the outlawry would be erroneous or not, for the
 reasons mentioned by the Defendant's counsel, or for any
 other reasons, an erroneous outlawry remains good till
 reversed by the party; and before he can be admitted to
 have his writ of error, he must appear and put in bail to
 the suit. *L. Ray.* 349. 2 *Salk.* 496—and then the pur-
 poses of the Plaintiff's proceeding to outlawry are satis-
 fied. But there is no necessity to resort to this consid-
 eration—the Plaintiff here, has used the utmost process
 that the law allows him; he has therefore done every thing
 in his power which the law required of him, and he must
 now be suffered to proceed against the other Defendant;
 otherwise, he would be without any remedy. This would
 be to carry the rule in favor of the Defendant much fur-
 ther than the reason of the rule will allow of. It never
 meant to deprive the Plaintiff of his debt when both could
 not be taken, but only to prevent him from proceeding
 against one only when both might be taken. Accord-
 ingly, there was judgment for the Plaintiff.

NOTE.—*Vide Anonymous*, 2 *Hay.* 70. Where one Defendant is taken, and an *alias* and *pluries* against the other Defendant, returned "not found," the Defendant taken, shall be allowed to plead to the action, and the Plaintiff shall come to issue as to him. *Price v. Seales* & *Lockhart*, 2 *Murphy* 199.

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Anonymous.

If a Plaintiff procures a copy of his bill and a *subpæna*, and delivers them to the Sheriff, in time to be served on the Defendant ten days before the term, and the Sheriff neglects to make the service until ten days before the next term after that, the Plaintiff's bill shall not be dismissed by a plea in abatement under the act of 1782, *Rev. c. 177, sec. 3.*

The Plaintiff had filed his bill in Equity, against the Defendant, in the office of the Clerk and Master, and had procured a copy of the bill, and a *subpæna* which he had delivered to the Sheriff in time to be executed; but the Sheriff did not execute the process at all before the next term. At which term, the Defendant appeared and pleaded in abatement, that the process had not been served upon him ten days before the term, at which by the process he was required to appear. To this plea the Plaintiff demurred.

(287) *Et per curiam*, HAYWOOD and STONE, Justices—The clause of the act upon which this plea is grounded, is in the act of 1782, c. 11, s. 2. It directs "That no writ shall be served by the Sheriff, unless he has a copy of the bill ready to deliver to the Defendant; and he is hereby required to deliver the said copy immediately after the service of the said writ; nor shall any service be valid, unless it be made at least ten days before the term at which the Defendant is required to appear; and where the service is by *subpæna*, the Defendant shall be served with a copy of the bill, at least ten days before such term: in failure of any of which requisitions, the Defendant may plead the matter in abatement, and the bill shall be dismissed." The intent of this clause is to allow the Defendant ten days time to consider of the defence proper for him to make—to employ the necessary counsel, and draw his answer, plea or demurrer. The Legislature supposed that all these things could not be done in a shorter time in most cases; and this time they have secured to him under the penalty of a dismissal of the Plaintiff's bill, in case of an attempt to shorten the time allowed by law. The mischief intended to be avoided, is, that of forcing the Defendant to make a defence before he has time to prepare for it. These provisions are similar to those made for a similar purpose in the act of 1777, c. 2. s. 14, where process at law, returnable to the Superior Court, is directed to be executed ten days before the beginning

of the term; and if otherwise executed, that it shall be adjudged void upon the plea of the Defendant. And in section 74 of the same act, where process returnable to the County Court, is directed to be executed at least five days before the return thereof; and if executed at any other time, that it may be abated on the plea of the Defendant. These several clauses being all intended for the same purpose, it is proper that the construction put upon them should be uniform. Now it has never been deemed to be the meaning of the clauses in the act of 1777, that process issued in time to the Sheriff, and returned unexecuted, should be abated by the plea of the Defendant, but an *alias* issues. The process is only abateable under the operation of these clauses, where it hath been executed within the times prescribed; or in other words, where it has been served in less than ten or five days before the commencement of the term. As the inconvenience arising from shortness of time, was that only which was intended to be avoided by the act of 1782, and is no greater in an Equity suit than in a suit at law, there can be no reason why a non-execution of process by the officer in the former case, should subject the Plaintiff to a dismissal of his suit, any sooner than it will subject the Plaintiff to an abatement of his suit in the latter—especially as the expression of the acts in both cases is confined to a service of process within the ten days, and not to a non-execution of process before the term. The words of the act of 1782, are, “Nor shall any service be valid, unless it be made at least ten days before the term.” The act here speaks of service actually made, and says it shall be invalid if not made a certain time before the term. It says nothing of the case of a non-execution of process.—The words of 1777, s. 14, are, “And shall be executed at least ten days” before the beginning of such term.—The words of s. 74, are, “And shall be executed at least five days before the return thereof”—all expressive of the same thing, namely, a service within the time, or a shorter time before the next term than the act directs. Were this plea allowed, it would establish the doctrine, that whenever a Defendant in Equity could be apprised of a bill filed, and process taken out, he might, by withdrawing or concealing himself from the Sheriff until the arrival of the term, cause a dismissal of the Plaintiff’s bill; though were it an action at law, the consequence would be otherwise. It would also establish this other equally absurd

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Apr. 1796. doctrine, that an officer by neglecting to serve an Equity process, might subject the Plaintiff to a dismissal of his suit and costs, when the same neglect in process at law, would produce no other inconvenience to the Plaintiff than delay. But surely it could never be the intent of the act of 1782, to make the Plaintiff's suit in Equity depend for its continuance in court, either upon the pleasure of the officer, or the honesty or the generosity of the Defendant, neither could the act mean to dismiss the suit, unless for some irregularity prejudicial to the Defendant, which the non-execution of process upon him is not; for that has only the effect of giving him longer time, and is an advantage to him. Moreover, the Defendant is to take advantage of the irregularity or failure mentioned in the act, by pleading it in abatement, both by the act of 1782, and the clauses in the act of 1777; but the rule is well known, that a Defendant cannot plead until he is called into court for that purpose by a service of process, unless he appears voluntarily, and the Plaintiff will accept of such appearance. This evinces the meaning of the act to be, that the plea in abatement is to be by a person served with process, and for an irregular service of process; not a pleading by a person not served with process at all, and who for that reason in legal contemplation, is not in court. It points directly to the case of process actually served, but within ten days next before the term. This plea does not disclose that case, but another, a total non-execution of process, which is to be remedied by a continuation or re-issuing of process, and cannot according to the true meaning of this act cause a dismissal of the suit. So the plea was overruled.

NOTE.—This case is recognized and approved, in *Worthington v. Colhane*, 2 *Car. Law Repos.* 68.

(289) **Moore Knight and Wife, v. Theophilus Thomas.**

The word creditors, in the act of 1784, *Rev. c. 225, s. 7*, respecting parol gifts of slaves, means, as well those who have become creditors since the parol transfer, as those who were such before.

Trover. *Thomas*, as Sheriff, had sold the negroes in controversy as the property of one *Pass*, to satisfy an execution of one of *Pass*'s creditors. It turned out upon evidence, that *Pass* had conveyed those negroes by parol, before witnesses, to the wife of the Plaintiff, sometime before this creditor obtained judgment, and before the

debt was contracted. It was argued at the bar, and admitted by the court, that the Judges heretofore have decided that under the act of 1784, c. 10, s. 7, a parol conveyance of negroes is good as between the parties themselves, as before the making of this act; but was void as to creditors, as well creditors who became such after the conveyance as those who were creditors at the time; for the mischief intended to be remedied by the act, was, that subsequent creditors had been defeated of their debts contracted upon the credit of a man's visible property, by means of secret gifts to children and others, made before the debts contracted often times, and when the party may have been in good circumstances. The court now assented to this construction of the act, and upon this ground granted a new trial, the jury having found for the Plaintiff as to one negro, who had been delivered in the presence of witnesses some years before—*Pass* had become a debtor to that creditor upon whose execution the negro was sold, and even before he became involved.

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NOTE.—*Vide* note to *Farrell v. Perry*, ante 2.

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Sneed v. Mitchell's Executors.

If one of two joint payees, endorses all his interest to the other, that other may maintain an action in his own name for the whole debt.

This was an action brought to recover money due upon a note of hand. The note when produced, appeared to have been given by *Mitchell* to *Sneed* and another, jointly; and that other had endorsed upon the note a writing, purporting that he had relinquished all his right and interest in the within note to *Sneed*.

Hill for the Defendant, objected, that this indorsement should not be received as evidence for the purpose now intended, namely, that of shewing the sole interest and right of action to be in *Sneed*—*Sneed* cannot be entitled as assignee, for both partners having one joint and entire interest, it will require the joint concurrence of both to transfer that interest to another—the endorsement of one only, will not transfer this joint and entire interest, part of which is in his partner, to a third person; and

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if the endorsement of both is required in the case of a stranger, it will equally require the endorsement of both, where the whole interest is intended to be passed to one of the partners as an assignee—for where he sues as assignee, he must set forth the custom of merchants; and there is no instance of one partner suing as assignee, under that custom, by virtue of an endorsement made by the other—though the Plaintiff is not named assignee in the writ, he must still state his title to sue, and make his demand in the declaration—How will he do this in the present instance? Can he say he is entitled by this assignment? This at most only passes the interest the endorser hath, a joint interest in the whole, or an undivided moiety in the whole; but it cannot move the interest the Plaintiff had prior to the endorsement—that would remain the same as before. If then such endorsement can have any effect, it must be that of making the Plaintiff to hold in two distinct rights, namely, the interest he had originally, and the same quantity of interest by assignment; and in order to state his case truly in the declaration, he must state, first, the making of the note, and his right that way; and then the endorsement by his partner, and his right that way. There is not any precedent of such a declaration—as therefore this action cannot be supported by the Plaintiff, either as assignee under this endorsement, nor yet as the original payee, there being another joint payee still alive, and who ought to have been joined in the action, I must submit whether this evidence is sufficient to be left with the jury.

Slade e contra—Though it be in general true, that a contract made with several persons jointly, must be sued upon by all jointly, that does not hold universally; for if some of them are satisfied, and their demands extinguished, they need not be made parties. *Watson's L. Part. 233. Espin. 11.* The suit may be supported by one of the partners who hath not been satisfied: and supposing this endorsement to have had no effect towards transferring the interest of the endorser to the Plaintiff, surely it may have the effect of extinguishing the claim of the endorser, as against the endorsee—and as before the endorsement, the Plaintiff had an interest in the whole and in every part of this note, he will not be after the endorsement in a worse situation; and being unsatisfied as to his demand, he may according to these authorities,

support an action for it. Had the endorser died, the Plaintiff might have sued in his own name undoubtedly—so when the endorser extinguishes his claim otherwise, there is the same reason the Plaintiff may sue alone—where the contract is made with two, there is good reason why both should sue—one of them by mismanagement or design might prejudice the interest of the other; it would be improper therefore, that one should be allowed to maintain the suit alone. This reason cannot apply in cases where the interest of one or more is extinguished: surely the remaining partners may sue, stating in their declaration the circumstances that prove the interest of the other to be extinguished. As to the assignment of both, being requisite to transfer the note to a third person, that is not exactly correct: it is usual for both to make the assignment: but yet if one only endorse, that is a sufficient transfer. *Kyd* 68. *Dougl.* 680, 653, 654. Then according to the argument used on the other side, if one can transfer to a third person, he may also transfer to the other partner, and so the Plaintiff is entitled to sue as assignee—but if both are required to make a valid transfer to a third person, it will not follow that both names must be endorsed, when one of the payees is to become solely entitled. If both are consenting that will do. It is absurd, that a man should endorse to himself. It is evident in the present case, that the endorsement of the one partner, was made by the consent of both; and the endorsement may be said to have been made by both—the only two persons in the world who had any interest in that note, having both consented that the whole interest thereof should be vested in one only. If the concurrence of both was requisite to the endorsement, such a transaction may well be considered as the transaction of both. If therefore the true reason why the law requires the joining of both in action, be what I have suggested, and will only hold where a joint interest is still kept up; or if the endorsement of one only be sufficient to transfer the interest of two joint payees; or if the apparent consent of two payees, be sufficient, although the name of one only appear in the endorsement, the Plaintiff is entitled to recover.

Per curiam—Each of two joint partners are entitled to the whole—the one may release his interest in the whole to the other, and that other will then be entitled to the

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May 1796. whole as before; but with this additional circumstance,  that the joint interest of the other having now fallen off, he is entitled solely to the whole. This circumstance however must be stated in the declaration, otherwise the joint contract produced in evidence, will not support the Plaintiff's claim. The court do not recollect any case like the present, though cases circumstanced like the present must very often have occurred; but upon principle there can be no good reason why this action should not be supported. Were this an endorsement of part it would not be good; for the Defendant cannot be subjected to more than one action by any act of the Plaintiff's. This endorsement, if it be considered as transferring a right, causes no multiplication of actions; the parties as to these remain precisely in *statu quo*. In truth, the endorsement by one of two joint payees, is good to transfer the whole contents of the note to an endorser, but it is not necessary to go upon this ground now. There can be no doubt but that one partner may release to the other, and leave him solely entitled to the money and the action—and of course, the Plaintiff is here entitled to recover. The reason why a contract made with several persons jointly, must be sued by all, is, because if they were to sue severally, they could recover only their several proportions; no one could recover all to the exclusion of the others—and if each could recover only his proportion, then the Defendant upon one contract, would be subject to as many suits as there were persons with whom he made it.—If one might sue alone, by the same reason, each of them might sue alone. All this mischief is avoided by one joint action brought by all. If each one of them could sue, then either the Defendant would be doubly charged, or one of them might recover and receive the money to his own use without the interference, and to the total exclusion of the others. This inconvenience is avoided by a joint action; but wherever the reason of a rule ceases, the rule will also cease. In most instances, more properly speaking, the rule extends no further than the reason of it warrants; and wherever the case is so circumstanced, that an action by one only, will not be accompanied or followed by the mischievous consequences before mentioned, there can be no good legal objection against it that appears in the present instance. Where one cannot be injured, by the other's proceeding for the whole, as

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he cannot be when he has relinquished his whole demand, May 1796.
 there is no reason for saying he shall not proceed alone. 
 It injures not his companion, nor does it take from the
 Defendant any advantage he might have, were the action
 brought by both ; nor does it subject him to any of the
 disadvantages the law was careful to prevent, when it or-
 dered those Plaintiffs to sue jointly, that were jointly (293)
 concerned. The Plaintiff had a verdict and judgment.
Vide 4 Bac. Ab. 661. 1 Mo. 102. L. Ray. 340.

State v. Johnston.

One bidder at a Sheriff's sale is sufficient, but the bidder must be one
 who is able to advance the money, which he offers as his bid. A
 return in the name of the High-Sheriff by his Deputy, if false, will
 render the Sheriff liable *criminaliter*. When a Defendant in court,
 is ordered into custody for a fine, it will be improper to discharge
 him and order a *fi. fa.* to issue for the fine. The court will not per-
 mit independent facts, for which the party would be liable to ano-
 ther prosecution, to be given in evidence, in order to enhance a
 fine.

Indictment against the Defendant, for that one——
 recovered a judgment in this court against *Howard*, and
 took out execution ; and put the same into the hands of
 the Defendant, being High-Sheriff of the county of On-
 slow, to be executed ; and that he had made return there-
 upon, that he had levied, but could not sell, for want of
 bidders ; which was a false return, &c. The judgment
 was produced on the trial, and also the execution with
 the return upon it. It was proven that the execution was
 put into the hands of the Defendant in due time to be ex-
 ecuted ; that he delivered it to his Deputy, who seized
 goods, and appointed a day of sale ; that on that day, the
 Plaintiff appeared with an intention to bid for the prop-
 erty, and also another person, a *Mr. Dawsey*, who was sent
 to purchase negroes for his father ; that the Deputy of-
 fered the property for sale, and that the Defendant *How-*
ard bid for each article as it was offered, a much higher
 sum than it was worth ; that such bids were received by
 the Deputy as good ones—the consequence of which was
 that no person present bid higher. In one instance, the
 Plaintiff bid, but *Howard*, the Defendant, immediately bid
 upon him a much greater sum than the property was
 worth ; which bid was also received. The Deputy re-
 turned the execution to the Defendant, his principal, re-
 questing him to make a return upon it ; which he accord^d

May 1796. ingly did, as stated in the indictment, viz. that the property seized, could not be sold for want of bidders.

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Per curiam, after argument—When bidders cannot be had at a sale advertised by the Sheriff, the usual return is, that the property cannot be sold for want of bidders; which being in the plural number, has occasioned a vulgar error, which unhappily hath formerly been countenanced by some of the profession, and adopted but too generally by Sheriffs—that there must be two bidders at least at a Sheriff's sale. Some have held there must be three—the Sheriff is to sell to the highest bidder, and highest, is in the third degree of comparison. These opinions are founded on very great mistake; if one bidder appears, and no other, the Sheriff ought to sell to him.—The substance of what the Sheriff is commanded to do, is to make the money mentioned in the execution, by selling the property; consequently, if one person having the money offers a bid, the Sheriff should sell to him, and receive the money from him, if no other bidder appears; and if in such case, the Sheriff returns that he could not sell for want of bidders, that return is untrue—but the Sheriff is not to receive the bid of any person who has not the money. A bid means, an offering of so much money for the property exposed to sale; not the mere verbal saying of the party, that he will give so much—therefore the bid of *Howard*, who had not the money, ought not to have been regarded; he was not a bidder. Should the Sheriff, even after he has cried a bid, become satisfied that the person making it hath not the money, he should reject that bid, and sell to that person, who was the highest bidder, having the money to pay. It is objected, that a principal is not liable criminally, for the misconduct of his deputy; that is true, but here, and indeed, in every case like it, the High-Sheriff is supposed to make the return; it is made in his name, it would not perhaps be good in strictness, were it made otherwise. It is also proven in the present case, that the return was actually made by the High Sheriff himself; and though from the representation of his Deputy, he might not have known that the return was untrue, yet as he was a sworn officer, it was his business to see that every return made by him was a true one—it is at his peril if it prove otherwise—should an objection of this kind prevail, no Sheriff could be punished criminally for a false return—he might make all

his returns upon the representation of his Deputy; and then the Deputy could not be punished, for he did not make the return—nor could the High Sheriff be punished, for he did not know but that the return was true—and thus a Sheriff would have it in his power to give what indulgence he pleased to the debtor, and defeat the end and purpose of all law and courts of justice. May 1796.

The jury convicted him—then the prosecutor moved to be at liberty to read to the court, the returns upon a great number of other executions made by the same Sheriff, in order to aggravate the fine; and it was moved by Jones, Solicitor-General, that the court had in other instances, allowed the character of a Defendant to be shewn by affidavits, in order to enhance the fine.

Per curiam—This has been only done where the matters shewn to the court by way of aggravation, have been relative to the matter for which the Defendant hath been convicted, not where they are independent facts for which the party is liable to another prosecution. We will not hear the other returns read. A few days after, the court fined the Defendant thirty pounds, and ordered him into the custody of the Sheriff of New-Hanover, till the fine was paid. Some days after this, an application was made to discharge the Defendant out of custody, as he had not wherewith to pay the fine now with him; and to issue a *fi. fa.* to the county of Ouslow, for the levying thereof—and it was urged, that the court had done so in the case of the Warrenton fines. (295)

Per curiam—The proper process to compel payment of a fine, is a *capiatur pro fine*, which is issued when the party is not in court at the time the fine is laid; but when he is in court, and is ordered into custody, it is like being in custody upon a *capias ad satisfaciendum*, and then a discharge from them by the Plaintiff's consent, will discharge the party from any other execution: and perhaps should the court now give into the present motion, it may hereafter be said, that a *fi. fa.* was irregular, as his discharge from his present confinement could not have been procured had the State opposed it. So the motion was denied. *Vide Salk. 56. Co. Inst. 218. Salk. 400. 4 Bl. Com. 368. 8 Rep. 59 b.*

NOTE.—Upon the first point, see *State v. Joyce, ante 43.*

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Anonymous.

Suit commenced against an executor returnable to the Superior Court, and suit afterwards commenced returnable to the County Court, which sat, first: to these latter suits the executor put in such pleas as made the assets responsible for their payment, and to the suit in the Superior Court he pleaded that he had no assets except what was liable to the payment of the other suits. The latter plea is not good: he ought to have confessed judgment to the suits in the County Court, and then plead those judgments to the suit in the Superior Court.

(296) This was an action against an executor, who pleaded that he had fully administered all the assets of the testator, except so much which was liable to former judgments and suits. This action was commenced prior to some others, which were the suits alluded to in the plea; but this action was returnable to the Superior Court, and the others to the County Court which was held before the Superior Court: and to these suits in the County Court, the pleadings were such as admitted assets of the testator sufficient to satisfy them. In support of this plea, it was argued for the executor, that although before any suit commenced, an executor, in case of deficiency of assets, may pay which of two creditors of equal dignity he may think proper; yet where one of them hath commenced suit, he cannot pay the other to his prejudice; and therefore he who first commences his action, is first entitled to payment. The executor in the present case, could not with any safety plead otherwise than he hath done—he hath pleaded the truth of his case to the suits he was first bound to plead to—he hath admitted assets, and made an appropriation of them to the creditors in these suits; and to this suit which he was afterwards bound to plead to, he hath pleaded in substance that appropriation. There was no other course for him to take. This method of pleading is sanctioned by the case of *Waters and Ogden*, and another administrator of *Meil*, reported in *Doug.* 453, 454. There the executor had assets, but to a certain amount, not adequate to the payment of the demand of either creditor; but he confessed what assets he had to the demand of one creditor, and to the other demand of the other creditor he pleaded the other suit, and the confession of the assets he had to that demand—and it was held well. In the present case, the executor had not assets to satisfy all the creditors; but he pleaded to the suits in the County Court, so as to admit and appro-

priate to these demands all the assets he had, and he has pleaded that appropriation to this suit. It would be excessively hard should he be compelled to satisfy this demand also, which must be out of his own pocket if satisfied at all. May 1796.

E contra—It was argued that amongst creditors of equal degree, it is not the first suit that entitles to priority of payment; but the first obtaining of judgment. *Off. Ex.* 138, 144. Where there are several demands of equal dignity, and the creditors all sue, and the executor hath assets but for part, if he pleaded to each of these demands that he hath assets but to a certain amount, each of them may have judgment to that amount: or if he plead to each *plene administravit*, at the trial a verdict must be against him upon each demand to the amount of the assets; because at the time of the plea pleaded, each plea was untrue, and the jury in each cause, must upon such evidence say that it was not a true plea at the time when pleaded; and so the verdict in each cause must be for the Plaintiff. If he plead to some of these suits the amount of the assets, and to the others that he hath made an appropriation of his assets, that will not be good pleading; because after suits commenced, he has not a right to pay whom he pleases first, but only such of them as could first get judgment. In such case where there is a deficiency of assets to pay all, the proper method to be observed by an executor is, to confess judgment to some of the creditors to the amount of his assets, and plead the judgments to the other suits. *Wood's Inst.* 332. *Nels. Ab.* 787. *God* 219, 223, 324. 1 *P. Wil.* 295. As to the case cited from *Douglas*, that is not applicable to this—there the assets were not sufficient to satisfy the demand of either Plaintiff, and for that reason the Plaintiff to whose suit the appropriation was made, would not enter judgment so that it could be pleaded to the other suit; and the executor had no means to compel him to enter it—but in the case now before the court, the assets in the hands of the executor, were to a much larger amount than the several demands sued for in the County Court; and had the executors confessed judgment severally to the amount of each demand, the court would have compelled the Plaintiffs in those suits, to have entered their respective judgments, so that they might be pleaded to this suit.

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Per curiam—Where there are several demands of equal dignity, and a deficiency of assets to pay all the creditors, before any suit brought the executor may pay to the amount of the assets, which of them he pleases; but if suit be brought, he can no longer make a voluntary payment—the commencement of the suit, and his having notice thereof, restrains him from making any voluntary payment; but still it is not priority of suit that entitles to priority of payment, but the first obtaining of judgment—consequently the pleading a former suit, as the executor has done here, is no good plea in bar of the Plaintiff. It should have been a plea of a former judgment, and that would have been good. The proper course for an executor to take, when there is a deficiency of assets and he is sued by several creditors of equal degree, is to confess judgment to as many of their demands as will cover his assets, and plead these judgments in bar of the other creditors. Where there are two or more suits of equal dignity commenced against him by several creditors, and he hath not assets enough to pay any one of them he must plead to some one of them the amount of his assets, making an appropriation of them to that demand, and plead that matter in bar to the other suits. The Plaintiff had judgment,

Anonymous.

The plea of *plene administravit* must be true when it is put in, and not at the time of the trial.

This was an action against an executor who pleaded *plene administravit*, and upon evidence it appeared the executor had really administered all the testator's assets in payment of his debts; but that a great number of these payments had been made, some upon judgment and others voluntarily, a long time after the plea pleaded, but previous to this time.

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Per curiam—The only thing now to be considered, is, whether the plea of fully administered, were true at the time it was pleaded—not whether it be true at this time. And as it appears that assets, to more than the amount of this demand, have been expended since this plea, in the discharge of judgments obtained since the pleading there-

of, the plea of course, could not be true when pleaded.— May 1796.
 The Plaintiff had judgment.

NOTE.—*Vide Evans v. Norris's Admr's.* post 411. *Surv. Partners of McNaughton and Co. v. Blocker's Admr.* post 417. *Churchill and La-motte v. Cameron.* Conf. Rep. 553, S. C. 1 *Murphey.* 39. *Collins v. Underhill's Ex'r.* 2 C. L. Repos 579.

Hogg's Executors v. White's Administrators.

The Administrator had failed to plead *plene administravit*, or any other plea shewing a want of assets, and the Plaintiff had obtained judgment, and upon execution issued, "*nulla bona*" had been returned: held, that the administrator was bound to pay *de bonis propriis*: and for that purpose a special *fi. fa.* might issue, reciting the return of "*nulla bona*," and commanding the Sheriff to levy *de bonis intestati*, if to be found in the hands of the administrator, if not, *de bonis propriis*.

In this action the administrator had failed to plead *plene* Vide, ante 218.
administravit, or any other plea shewing a want of assets—
 —the Plaintiff had proceeded to judgment in the usual form to be levied *de bonis testatoris*. He had taken a *fi. fa.* upon this judgment, to which the Sheriff had returned *nulla bona*. And now it was moved on the part of the Plaintiff, that a special *fi. fa.* should issue to the Sheriff, to levy the debt *de bonis testatoris*, if any to be found, and if not *de bonis propriis* of the administrator. This motion was opposed by *Spillar*—he argued that there could be no judgment *de bonis propriis*, against an executor or administrator, but when he pleaded a false plea, the falsity whereof was within his own knowledge; and which plea were it true, would be a perpetual bar to the Plaintiff. *Off. Ex.* 184, 185. *God.* 198, 199. Where he pleads no plea at all in respect of the assets, or if he confess the action, or suffer judgment by a *non sum informatus*, the judgment can only be *de bonis testatoris*. *Off. Exec.* 187. *E contra*—It was argued, that by the law of this country, lands in the hands of the heir or devisee, are liable to the debts of the testator, where the personal estate is insufficient; but the words and the express provision of the acts on that subject, viz: 1784, c. 11. 1789, c. 39, direct that the lands shall be resorted to only in cases where the insufficiency of the personal estate judicially appears on the record upon the plea of *plene administravit*, no assets, or not sufficient assets, being verified by the finding of a jury. The creditor cannot take out his *sci. fa.* against the heir, before these pleas, or

May 1796. some of them, are found by the jury. Without considering therefore what the law may have been before the passing of these acts, it is now certainly law, that if an executor will not plead a want of assets, he must be taken to have enough to satisfy the Plaintiff's demand; since by not pleading in that manner, he prevents the Plaintiff from having recourse to the real estate. Were the executor under such circumstances not liable *de bonis propriis*, he might render these laws in favour of creditors of no avail. He would have nothing to do, but to avoid pleading any of these pleas, and the creditor would be defeated forever; he could have no remedy against the executor, nor could he proceed against the real estate of the deceased. Whatever might have been the law before the passing of these acts, undoubtedly it is now certain, that the executor is liable to answer *de bonis propriis*, in all cases where he fails to plead a want of assets to satisfy the creditor's demand.

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Per curiam—It is contended that before an executor can be charged *de bonis propriis*, some process should be issued against him, to which he might shew by pleading, that he ought not be charged *de bonis propriis*; and certainly if in a case like the present, the Defendant may plead *plene administravit*, such process should go before a judgment *de bonis propriis* shall be entered. It is to be considered then in the first place, whether were a *sci. fa.* now issued, could the Defendant be admitted to plead to that, *plene administravit*—as to which, the rule in this case, as in all others, is this, where the Defendant to the original action might have pleaded a matter of defence, and failed to do it at the proper time allowed by law for that purpose, he can never afterwards, be admitted to plead that matter to any other suit grounded upon that original suit. He cannot plead to a *sci. fa.* any defence he might have pleaded to the original action out of which it is derived. Now it is evident he might have pleaded *plene administravit* to the former action, if the fact were such that he had fully administered; and therefore should a *sci. fa.* now issue, it could be of no service to the Defendant, as to any defence he might set up under it. As to the manner of charging an executor *de bonis propriis*, the practice has varied at different times in different courts—sometimes they have proceeded by way of *sci. fa.* inquiry, whereupon *nulla bona* returned, the Sheriff was commanded to make the money as before; and if he could

find no goods of the testator, then to enquire by a jury May 1796.
 whether the Defendant had wasted; and if the jury found
 a *devastavit*, then to return the verdict to court; where-
 upon, there went out a *sci. fa.* against the executor, to
 shew cause why the Plaintiff should not have satisfac-
 tion *de bonis propriis*. *Off. of Executors*, 166. At other
 times, the practice hath been, for the Sheriff to return a
devastavit; or if he is unwilling to do so, for the court
 to compel him to return a *devastavit*. *Off. of Exe.* 168.
God. 199—and thereupon, to issue a writ of execution
 commanding him to levy *de bonis propriis*; or where the
 Sheriff returns *nulla bona*, to issue a special *fi. fa.* com-
 manding him to levy the debt *de bonis testatoris*, or if it
 could appear that the executor had wasted, &c. then to
 levy it of his own goods. *Off. of Exe.* 167, 168. 5 *Re.*
Pottifer's case. As to the *sci. fa.* inquiry, and *sci. fa.*
 thereupon, it is said in the books before cited, that that
 course hath been long disused, it not being so beneficial
 a course for the Defendant as that which directs the Sher-
 riff to return *devastavit*; for that in the first case, if the
 verdict be wrong, the Defendant is without redress, no
 remedy lying against the jury—attaint will not lie, be-
 ing not a verdict upon an issue joined—and he has no re-
 medy against the Sheriff, for he is justified in his return
 by the verdict. However, the other way of returning a
devastavit, seems equally useless; for if the Defendant
 hath failed to plead a want of assets, it is an admission
 of them; and a jury will not have it in their power to
 say *non devastavit*. So if the Sheriff after such omission,
 returns *devastavit*, he cannot be liable to an action for
 that return; for the jury, as well as the Defendant, are
 estopped by the record, to say that he did not waste as
 the Sheriff hath returned. *Salk.* 310. *L. Ray.* 589.—
 Either of these methods then can answer no valuable pur-
 pose—the Defendant by omitting to plead want of assets,
 becomes so absolutely liable to answer *de bonis propriis*,
 that no plea he can make, nor any finding of a jury, can
 afterwards exempt him. If the Defendant can have no
 benefit by either of these modes but that of delay, it fol-
 lows, that the law will not require either of them to be
 pursued; for in directing process, the law always sup-
 poses the Defendant may have some defence to make—
 where he can have none, it is useless and nugatory to is-
 sue process to him. In every possible case at the com-

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May 1796 mon law, where the Defendant omits to plead want of assets, whether it happen by confession of the action, judgment by default, or otherwise, such omission amounts to an admission of assets. It must be deemed that there are assets enough, when the executor whose business it is, will not say the contrary. And when a judgment is once given against an executor, who has assets enough, he is bound to produce them, or pay the judgment himself *de bonis propriis*. 3 Term 685. To permit the Defendant to plead a want of assets, after the proper time for pleading is passed, is not only against that order which in all cases is observed, but it tends to make proceedings in court infinite; and to introduce delays, which the order of pleading was invented to prevent—and besides, to what time will such a plea after judgment, relate? If it relate to the time when it is put in, then the assets may have been applied in the intermediate time in discharge of other debts. This enables the executor, after suit instituted against him, and even after judgment upon it, to pay other creditors; which is directly against law; for after suit instituted, he cannot, voluntarily, pay any other creditor of equal degree first. Or will it relate to the time when process in the original suit was first taken out? Shall the plea state that at the time of the leading process in the first suit taken out, or any time since, he had not in his hands any of the goods, &c. of the testator to be administered? If this must be stated, then why not inforce him to plead in the first instance? Is it not better that he should do so and shew his situation at once, than put the Plaintiff to the fruitless expence of a second suit by *sci. fa.* It would be better, as it would save the additional expense and litigation of a second suit—that is a strong argument to prove that the law requires it. It cannot be supposed in a case which so often happens, that the law has not fixed upon that mode of conducting the pleadings, that is best calculated to oust delays and prevent litigation and expense—and then what reason can there be, why a special *fi. fa.* to levy *de bonis testatoris si et si non de bonis propriis*, shall not issue at once? The return of *nulla bona* is then as complete a proof of a *devastavit*, as if that were returned expressly; for, if by the previous judgment and proceedings, it appears to the court he has assets, and is bound to produce them or pay the debt—and also by the Sheriff's return of *nulla bona*, that he has

not produced them, does it not follow, that he is by what May 1796.
 already appears upon record, liable *de bonis propriis*. —
 Does the record not prove that he has no other alterna-
 tive, and can make no plea to exempt his own proper
 goods? The return of *nulla bona* proves his liability as
 completely as that of a *devastavit*, since both must inevi-
 tably end in the same consequence—that of an execution
de bonis propriis. It cannot therefore, be of any service
 to the Defendant to require a *sci. fa.* or a return of a *de-*
vastavit—they can be no more than forms leading to the
 same event, as that of a special *fi. fa.* issued upon a re-
 turn of *nulla bona*—and as the *sci. fa.* grounded immedi-
 ately upon the return of *nulla bona*, or upon the finding
 of *nulla bona* upon a *sci. fa.* inquiry, can be of no service
 whatever to the Defendant, as he cannot avail himself of
 the plea of *plene administravit* under them, not having
 done it before, there is no good legal reason for using (S02)
 these modes preferably to that of a special *fi. fa.* upon the
 return of *nulla bona*—the ultimate proceeding either way
 will turn out the same thing—and nothing more will be
 gained by the *sci. fa.* than a few terms longer delay to the
 Plaintiff. But if it can be supposed the common law is
 not so, yet since the passing the act of 1784, there is the
 greatest reason and justice in the world, that the execu-
 tor or administrator who fails to plead *plene administra-*
vit. &c. should pay the debt out of his own pocket; for
 by such omission he effectually hinders the creditor from
 having any satisfaction out of the land. Since therefore
 a further process by *sci. fa.* against the Defendant will be
 of no real benefit to him, by letting him in to plead fully
 administered, and as the issuing of a special *fi. fa.* upon
 a return of *nulla bona*, is sanctioned by the *Office of Exe-*
cutors, a book of high authority upon this subject, and al-
 so by the judgment in *Pottifer's case*, 5 Re. 32—and as
 the principle of these cases is recognized in a decision
 of the court last spring at Fayetteville, let a special *fi. fa.*
 now issue, reciting the return of *nulla bona*, and com-
 manding the Sheriff to levy the debt of the goods of the
 intestate in the hands of the administrator if to be found,
 and if not to be found, then of the proper goods of the ad-
 ministrator himself—which was done accordingly.

NOTE.—*Vide Parker v. Stephens*, and the note thereto, ante 218.

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Maxwell v. Holland.

Mr. McLain had been counsel for the Defendant, and after his death, no other counsel had been employed, and the Defendant had removed to some part of the world, the Plaintiff knew not where—the Plaintiff wished to take the deposition of a man who lived in New England, and prayed the court to direct to whom, and in what manner notice of taking it should be given, there being neither party nor counsel upon whom it could be served.

Per curiam—Let notice be given in the Fayetteville Gazette three weeks successively, that the deposition will be taken at a certain place and day, at the distance of three months after the publication. The Plaintiff should not lose his testimony, because the other party hath removed himself, and failed to appoint an attorney upon whom notice might be served.

Anonymous.

If a *certiorari* be obtained to remove a cause upon the ground that an appeal had been refused in the court below, the case shall be placed upon the trial docket, without shewing any other cause.

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This suit had been commenced by a warrant issued by a Justice of the Peace. There was an appeal from the judgment of the Justice to the County Court, where a trial by jury was had. There an appeal was moved for, which the County Court denied. He then obtained a *certiorari* to remove the proceedings into this court, upon an affidavit stating the above facts. This *certiorari* was set down on the argument docket in this court, and now the Plaintiff in the *certiorari*, stated the reasons for obtaining it as above; and it was argued on his behalf, that wherever the County Court refuses an appeal, where by law the party is entitled to it, and moves for it in proper time, and offers to perform the requisites for obtaining an appeal, and a *certiorari* is obtained for that cause, the court here will grant a new trial without inquiring further than whether an appeal was refused—and as it is admitted in the present case, that the appeal was refused, it is not incumbent upon the Plaintiff in the *certiorari*, to shew any other cause in order to obtain a new trial here. And of this opinion were the court clearly; and the other side admitting that an appeal had been re-

fused, though the party praying it offered to assign reasons, & give security for prosecuting with effect, they ordered the cause to be set down for trial, and to be placed amongst those for trial at the next term. And it was done accordingly. May 1796.

NOTE.—*Vide Chambers v. Smith, post 366.*

Mills v. McAllister.

Since the act of 1762, *Rev. c. 69*, the courts may exercise a discretionary power in the appointment of guardians.

This was a dispute about the guardianship of the child of *James McAllister*, deceased. It originated in the County Court of Brunswick, and came up to this court by way of appeal from thence. The guardianship was applied for by *McAllister*, the uncle of the infant on the father's side, but the County Court appointed *Mills* the guardian, who was no way connected to the infant by blood. It was now stated at the bar and admitted, that *McAllister*, the uncle, the present applicant for the guardianship, with several others of the family, in the life-time of the deceased, had signed a deed purporting to be a conveyance for a very valuable tract of land to *James*, the deceased, and that since his death, the applicant claimed that tract of land, or a considerable part thereof, to his own use, in the face of that conveyance. This cause now came on to be argued by *Taylor* for *Mills*, and *General Davie* for *McAllister*. *Taylor* argued that the guardianship ought not to be committed to *McAllister* the uncle, because it was a rule of the common law in the case of a tenure in socage, that any person to whom upon the death of the infant, his inheritance might by any possibility descend, should not be entrusted with the guardianship of the infant—No one who hath any temptation to remove the infant out of the way, shall have the custody of him. *Co. Lit. 87, b, 88, a & b*. In the present case should the infant die, the uncle now applying for the guardianship, would be entitled at least to a part of the inheritance of considerable value; the court cannot appoint him without infringing the rule just mentioned—a rule founded in so much prudence that the Judges have always respected it. Also it may be with reason contended, that the Judges in this country have it in their discretion to appoint whatever person they think

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most proper to act as guardian for an orphan—the ancient common law did apply in this country before the passing of the act of 1762, c. 5. Our tenures were then socage, but by the fifth section of that act, either the Superior or Inferior Courts were empowered to appoint guardians in such cases where to them it appeared necessary, not saying whom they should appoint, and without saying they should be bound by the rules of the common law, or indeed by any rules designating the person to be appointed. If the court have this discretion, and are not bound by the rules that govern in the case of socage tenures, then there are strong objections against the appointment of *McAllister*—he resides out of the limits of this State, four or five hundred miles from the estate of the orphan; whereas *Mr. Mills* resides in the neighborhood, and can attend to the affairs of the orphan with more convenience and punctuality than *Mr. McAllister*; who, should he be appointed, must either leave the management and care of the infant's estate to some agent, or neglect them in a great measure: and moreover, *Mr. McAllister* having a claim upon part of the estate, and being let into possession by his appointment, may immediately hold for himself, converting the profits to his own use; and as the infant is now very young, not being more than a year old, if so much, when he arrives at age, it may be very difficult at so great a distance of time to procure the proper evidences, either of his title to the estate, or of the amount of the profits made by his guardian. For these reasons he submitted, whether it would not be very improper to appoint *Mr. McAllister*.

(305) *E contra*—It was argued by *Gen. Davie*, that though the rule respecting guardianship in socage, was as laid down by *Mr. Taylor*, that such of the next of kin to whom the inheritance could not descend, should be the guardian; it was equally true by that rule, that such person as was qualified to be the guardian must be next of kin. *Co. Litt.* 88, b. It is laid down expressly, that none can be guardian in socage, but the next of blood. This part of the rule will at all events go the exclusion of *Mr. Mills*—the court are bound by the rules respecting a guardian in socage—they can appoint no other person than one marked out by them—they were bound by these rules previous to the act of 1762, and that makes no alteration of the former laws in respect of persons qualified for the

guardianship; it only directs in general, that the courts when necessary, shall appoint a guardian, leaving them to be directed in their choice by the rules of law already established: and as to the objection raised against *Mr. McAllister*, that he claims a part of the orphan's estate, when the orphan comes to the age of fourteen years, he may call to account for the profits, as well as he could any other person, and may then chuse a new guardian if he should think proper.

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Per curiam—Guardianship in socage was a consequence of socage tenure, and dependent upon the existence of that tenure; where there is no such tenure, there is no such guardianship, strictly speaking; though it may be very proper to pay some attention to the rule, in the appointment of guardians, as it is calculated to prevent the orphan from falling into hands, where, he could not with safety be trusted. In like manner, as where the ancestor died seised of an inheritance that lay not in tenure, it is held as a rule, that the next of kin to whom the inheritance cannot descend, should have the custody of him. *Co. Litt.* 87 b. As all our lands are now allodial, the rules cited at the bar on either side, are not strictly obligatory on the court. The act of 1762, concerning the management of orphans and their estates, was passed at a time when the lands of this country were held by socage tenure, and from thence that act may be supposed to have been framed, with a view to the rules relative to guardianship in socage. That supposition will vanish, if it be considered in how many material points the guardianship established by that act differs from the guardianship in socage—the guardianship in socage needed not the appointment of any court; the person entitled to be guardian was as precisely marked out by law, and as well entitled by it, as the heir at law himself—where there were two or more in equal degree of kindred, to whom the inheritance could not descend, the law gave a rule of decision not by saying they should apply to a court for the appointment of the one or the other, but by saying that he who could first get possession of the heir should have the guardianship of him. When the ancestor died seised of lands, part of which descended on the orphan's death to relations on the father's side, and part to relations on the mother's side, in that case although the heir must fall into the possession of some person, liable to the tempta-

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May 1796. tion meant to be avoided by the rule, no court was called upon to appoint a guardian not liable to that objection, but such of the next of kin as could first get possession of the heir, should have the custody of his person, and the kindred on either side might enter as guardian on the possession of the lands that could not descend to them. *Co. Litt.* 88 *a* & *b*. This proves that the guardian in socage derived his appointment and authority from the law immediately, without the intervention of a court; and he might enter immediately on the death of the ancestor upon the lands descended to the orphan, and also might immediately take possession of the ward: but the act of 1762, manifestly intended that no person should interfere with either, but in consequence of the appointment of the County or Superior Court; and that no person should receive the appointment, unless he gave security as the act requires—this was a circumstance not required in the socage guardianship. If the act had intended that a person designated by law, should be entitled to the guardianship, it would have been useless to have vested the power of appointing him in the County or Superior Court: their appointment of a person already appointed by law, would be at least a redundant, if not an absurd act. The socage guardian could not interfere with any part of the ward's property but his lands held by socage tenure, not with his copyhold lands and the like—and not with any part of his personal estate; by this act he is intrusted with the whole estate of his ward of every kind. In England it was usual for the Ordinary to appoint a guardian over the body and personal estate where there was no land held by socage tenure. *Wood's Inst.* 68. *L. Ray.* 1334. The act of 1762, consolidates the guardianship of the body, lands and personal estate, and vests the appointment of a proper guardian in the County or Superior Court. When personal property came to be considerable in England, the inconvenience of the guardianship in socage began to be felt, and was attempted to be remedied by the act of 12 *Car.* 2, *c.* 24, allowing parents to appoint guardians to their children till twenty-one. These testamentary guardians did not lose their authority by the ward's arrival to the age of fourteen years, nor could they be displaced by the ward's chusing another guardian at that age. These were some of the inconveniences experienced under the former law—or—

phans of the tender age of fourteen, oftentimes made imprudent choices of guardians—these testamentary guardians, however, like others, were liable to be removed by Chancery, after the abolition of the court of wards in the beginning of the reign of *Charles II.* for misbehaviour in their trust; or for giving room to suspect they were about to marry their wards in disparagement. The act of 1762 adopts the same provisions amongst its first clauses; from whence there is reason to believe the Legislature were actuated by the same motives as the framers of the act of *Charles*—the act of 1762 evidently contemplates, that the guardianship committed by the court, should be of the same duration as that made by the appointment of a parent, namely, to the age of 21; for the 11th, 12th and 13th sections give directions about preserving the estates of orphans, and leasing out their lands till they arrive to the age of 21. This act therefore cannot have a regard to the old law relating to guardianship, but meant to alter it entirely—it gives the court power to appoint till the ward came to age, such person as they may think proper to be his guardian, with authority to remove him whenever he misbehaves in the trust they have committed to him. This is a much more effectual mode of procuring proper guardians, and of keeping them steadily to their duty, than if the court were obliged to appoint the next of kin, to whom the inheritance could not descend, who in numerous instances might be very unfit persons; as the court have a discretionary power of chusing the most proper person, they should make their election of that person who can best attend to the affairs of the orphan, and whom they have reason to believe will attend to them with the greatest advantage and most fidelity to the orphan. *Mr. McAllister* is stated to live at the distance of four or five hundred miles, in another State—should he be appointed he must either carry the ward with him to his place of residence, where the court cannot from time to time be informed of his treatment, or he must leave the ward in the possession of some agent, instead of attending to the charge of his education himself: add to this, that the estate of the ward must in like manner be committed to the management of an agent, or be greatly neglected. *Mr. Mills* resides on the spot, near to the orphan's estate, and in the county where it lies; should he mismanage either with respect to the per-

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May 1796. son or estate of the ward, intelligence may immediately be conveyed to the court, and his misbehaviour corrected. *Mr. Mills* has no prospect of ever succeeding to the ward's estate, whereas *Mr. McAllister* has; and tho' this is not a consideration absolutely obligatory in the court, they will not entirely disregard it—though they may appoint whoever they think most proper, even the next of kin in the immediate line of succession, they will not out of prudence do this where the estate is large, and any other person equally as well qualified offers or can be procured to take the guardianship upon himself—the Court of Chancery in England always governs its discretion by this consideration, among others, though the contrary was once avowed in the case of an application by Justice *Dormer*. There is also another circumstance in the present case, which hath been mentioned at the bar, and is not denied, that ought to have great weight—it is stated that *Mr. McAllister* claims part of this very estate, the wardship of which he is now seeking. It is said in avoidance of this objection, that the orphan upon his arrival at fourteen years, may chuse another guardian, and call him to account for the profits; but if we appoint *Mr. McAllister*, he will be entitled to the custody of the evidences of the Plaintiff's title to this estate—and shall we give the custody of these evidences to the man whose interest it is, and who is so much concerned to suppress and conceal them? Surely, the court would act a very imprudent part to do so. Wherefore let *Mr. Mills* be appointed—and he was appointed accordingly, and gave bond and sureties as the act requires.

NOTE—The County Court, in appointing a guardian, need not regard the choice of the infant, although he may be above 14 years of age. *Wynne v. Always*, Conf. Rep. 554. S. C. 2 Hay. 336. S. C. 1 Murph 38. *Bruy's orphans v. Brumsey*, 1 Murph 227. *Grant v. Whittaker*, *ibid.* 231. See also *Long v. Rhymes*, 2 Murph. 122.

Niven Clark v. Kenan and Hill.

The action of trover may be supported against executors for a conversion in the lifetime of their testator.

Vide, ante 4, 21, and post 362. This was an action of trover, originally brought against the party who converted; but he dying, his executors were made parties under the act of 1786, c. 14, and the Plaintiff proceeded to take a verdict against

them. The Defendants moved to arrest judgment, for May 1796. that they as executors, were not liable to a recovery of damages by the Plaintiff for a conversion in the lifetime of their testator, and of which he alone was guilty. They relied upon the case of *Hamly and Trott* in *Cowp.* 371; and insisted, that as this point of the common law which had been so long doubted of, had then come before the court, and had upon argument and mature consideration received an unanimous decision, it ought now to rest, unless very substantial reasons could be given against the propriety of that decision. It is of great importance that the rule of law should be known, and that it should be steady and uniform in its operation—uncertainty of a rule of such frequent application, is the parent of great confusion, and is of very great detriment to the parties concerned in the application. (309)

E contra—It was argued by *Mr. Hay*, that though he was ready at all times to contribute his share of applause to the great abilities of *Lord Mansfield*, and the rest of the court who made the decision in the case of *Hamly and Trott*; and though he was at all times ready to pay a proper deference to the opinions of so great a man, he yet could not place an unbounded confidence in them, nor give himself up to be governed by them; nor could he be brought not to suspect, but that these opinions, like all other human productions, did sometimes partake of human infirmity—and more particularly would he be inclined to doubt the propriety of the decision in the case of *Hamly and Trott*, so far as it may be attempted to be applied here, since the Judges of this country have so often had the case of *Hamly and Trott* under consideration and decided against it. They have decided in many instances, that the action of trover is maintainable against executors. It was decided by *ASHE* and *WILLIAMS*, Judges, Edenton, April Term, 1793, in the case of *Decrow v. Moore's executors*. The same point was decided by *ASHE*, *SPENCER* and *WILLIAMS*, Judges, at Edenton or Newbern, some time before this; and the same point was decided by *WILLIAMS*, Judge, Morgan, September Term, 1791, *McKinnie's executors v. Oliphant's executors*. Many other decisions to the same effect have taken place before the same Judges in different parts of this country, and if it be of importance that the rule should be steady and uniform, it is surely far better to adhere

May 1796. to these decisions, which have taken place in our own country, and have been acted upon as the law of the country, than now to alter the rule established by them, and adopt a contrary one out of mere complaisance to the decisions of *Lord Mansfield* and the rest of the court of King's Bench in England. To shew that we ought not to deliver ourselves up to the authority of this decision, I will take the liberty to mention the opinion of Lord Chancellor *Hardwicke*—he says, speaking of a subject similar to that now before us, 3 *Atk.* 757, trover may be brought by an executor, and it seems strange and contrary to justice, that these actions should not lie against executors as well as for them, &c. An opinion very similar to this was delivered by *L. Ch. Cowper.* 1 *P. Wil.* 407. These authorities may serve to shew, that very great men have entertained opinions different from those delivered by the court in the case of *Hamly* and *Trott*, and therefore we should at least take the liberty of suspending a perfect acquiescence in its propriety till we have collected such lights as will enable us to decide upon this subject for ourselves. No inconvenience can result from saying this action will lie against executors, but cases may be conceived where the contrary position will defeat injured persons of justice. Such a case is stated in the arguments in the case of *Hamly* and *Trott*, and is never answered; and *Lord Mansfield* says, suppose the testator had consumed them and eaten the sheep, is the executor to get off altogether? Another of the Judges says, where goods come to the hands of an executor in specie, trover will lie; where in value, an action for money had and received—but I would ask what remedy has he where the property has neither come in specie or value to the executor, as where the testator killed the sheep of the Plaintiff and eat them—no value there came into the hands of the executors—if trover will not lie in that case assumpsit will not, as it can only be implied in cases *ex contractu*, or *quasi ex contractu*. A contract can never be implied from a direct trespass, you can only imply a contract where the party hath received value for your property—as where he drives your lamb to market and sells it, you may in such case elect to consider him as doing so by your permission, but there is no instance of converting the killing of your animal *vi et armis*, into a contract to pay so much for him—and so long as the ancient boundaries of actions shall be preserved, so long as

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the trespass *vi et armis* cannot be converted into an action on the case, upon assumpsit, so long will it be impossible for the Plaintiff to get any redress in a Court of Law for such injury as I have just mentioned, unless the action of trover may be supported against executors. May 1796.

Curia advisari—And after three or four days consideration, they delivered their opinions that this action was maintainable against the executors, for a conversion by their testator in his lifetime. The case of *Hamly* and *Trott* they said was entitled to much respect, having been determined upon deliberation by men of the greatest talents; yet it seemed upon consideration to leave some injuries without redress at the common law, and particularly the cause stated by the counsel. It is better to adhere to the decisions that have formerly taken place here, since they have been made, and are found to be productive of no inconvenience, than by deciding differently from the other Judges to make the rule of law uncertain—should these decisions be found in any future time to produce disorder, they may be altered by the Legislature, or by a solemn judicial determination to the contrary. So there was judgment for the Plaintiff. (311)

NOTE.—*Vide McKinnie's Ex'rs. v. Oliphant's Ex'rs.* and the references in the note, ante 4.

Den on the demise of *Andrews v. Mulford*.

Where two patents or grants bear date on the same day, the number of the patents or grants must determine their priority. No possession except an actual one, by the claimant himself, or his tenant, commenced *bona fide*, under a patent or grant, adverse and continued for seven years, will give title under the act of limitations.—When the act of limitations once begins to run, none of the impediments mentioned in the act, will stop its course.

Ejectment. *Andrews* had lately purchased a tract of land of the heirs of *Mr. Waddle*, the patentee. *Mulford* derived his title under *Spikes*, the patentee of an adjoining tract. He proved the beginning of *Spike's* tract, and every line and corner mentioned in the patent, and located that tract beyond doubt. *Andrews* proved that a line called *Waddle's* line, was seen when recently made, many years ago, by one of the witnesses on the other side; which line included a part of the land comprised in *Spike's* patent; and this line had been acknowledged in conversation since, by *Spikes*. It was also proven, that *Wad-*

May 1796. *dle* informed *Spikes* many years ago, that that was his line. Both *Spikes'* and *Waddle's* patents were dated on the same day—*Waddle's* was numbered with the number 4, and *Spikes'* with the number 73; but *Spikes'* survey was made several months before *Waddle's*. *Spikes* used this disputed part of the land, with the other part included within the lines of his patent, very soon after it was issued, by keeping his cattle upon it; and continued to use it as a range until the year 1770, when he took actual possession in person. About the beginning of the late war, *Mr. Waddle* moved to Europe, carrying with him his two sons, infants of very tender years, who returned and came of age within three years previous to the bringing of this suit, which was commenced sometime in the year 1794. *Spikes* purchased his location of this land from a man who had built an hut, and lived upon it several years, intending to enter it in the land-office prior to the time of *Spikes'* entry.

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Counsel for *Andrews*. The whole of the present controversy may be reduced to this—whether *Spikes'* or *Waddle's* is the preferable title. The evidence proves that the land in dispute is included within the description of both patents—according to the common phrase, one patent laps over upon the other—the line as laid down in the plat before the court, very probably may not be a true representation of the line actually run; but it is incontestible, that there was a line run and marked as a boundary of *Waddle's* patent, of the same course with the line there described. It is equally incontestible, that this line intersected the boundaries of the other patent. It was seen within these boundaries by one of the witnesses, who carried the chain in surveying of *Spikes'* tract. It was mentioned to *Spikes* by *Waddle* afterwards, and described to be within these boundaries; and *Spikes* gave as a reason why he would not place his house near his boundary line towards *Waddle's* tract, that *Waddle's* line would take it in, it running some distance within the lines of his, *Spikes'* patent. The beginning part of *Waddle's* line that intersects the lands contained in *Spikes'* patent, is a corner pine called for in the patent—but it is said, and perhaps proven to be a corner of another tract—that is no proof of its not being also a corner of *Waddle's* tract. It probably is so from this circumstance, that the other line terminating at this corner, is a marked line of the

same course with that of *Waddle's*. This line is said to ^{May 1796.} be continued much further than the length of *Waddle's* line will reach. It is useless however to labor this point, for if it be true that the line of *Waddle's* patent, described as running from the pine to the swamp, be the line seen by the witness and acknowledged by *Spikes*, it intersects *Spikes'* boundaries, and cuts off from his tract almost all the land we have sued for; and that it is the line of *Waddle's* patent, is sufficiently established by the evidence.

The next thing proper to be considered of, is, the date of these two patents, and such other circumstances as may serve to give the one of them a preference to the other. The point of preference must be settled before it can be decided, which of the two litigants is entitled to the land in dispute. These patents are both dated on the same day—ours was first numbered, though theirs was first surveyed. Heretofore priority of date in patents hath always been held in our courts to give preference of title. He who made the latter entry and latter payment of money, may have procured the first survey. A man entitled to preference in every view of justice, and who has paid his money, and made his entry, and hath been for some time perhaps settled upon the land, and improved it, may have his survey postponed to suit the convenience of the surveyor, and the survey be first made upon the other's claim, inferior in every respect. The survey or any other proceeding prior to the grant, is no part of the grantee's title—these are only preparatory steps towards obtaining that which will give a title—the grant is the only evidence of title that the law recognizes—should the first survey be made the criterion of preference, it would beget the utmost confusion—many old grants have no plats annexed to them, and none were ever annexed—there is no record preserved of the time when the surveys were made—what decision shall be given in cases thus circumstanced? Or what merit is there in a claimant getting his land first surveyed, more than there is in getting his grant, the complete evidence of title, first perfected? There might indeed be some justice in saying, that he who first made his entry and paid his money, should be entitled to preference; but in this there would be very great uncertainty. The first entry and payment of money, might be aimed directly against the claim of a man who had settled and improved, and who under the

May 1796. existing laws was entitled to a grant preferably to any other. Add to this, that there never has been preserved any record of these entries. Without investigating the reasons of the rule originally, it will be sufficient to say, that the priority of date in the grant, is the true criterion of judging which of two patentees has the best title, without regard to the time of any other transaction. This rule has been so long and so firmly established, that it is known to every one to be the rule which hath always prevailed in our courts. If then the grant first issued be entitled to preference, when there are two grants for the same land both dated on the same day, we must necessarily lay hold of some circumstance, the strongest that presents itself to turn the scale. Our grant is numbered with the number 4, theirs with the number 73, from whence the presumption is, that they were issued and registered by the Secretary in the same order in which they are numbered, and consequently that our grant was first perfected. The numbering them at all can be intended for no other purpose than that of shewing which was first issued.

(314) It will be argued, that we were never in actual possession of the land in question, nor of any part of the tract of which the land in question is a part—this must be admitted. It will also be insisted, that the possession of the person who made an ax-entry, as it is called, added to the possession which *Spikes* had by his cattle, previous to the time when he took actual possession in person, is sufficient under the act of limitations to perfect their title and destroy ours. As to the possession of the ax-enterer, that was without any deed or colour of title. It was a possession of vacant land, and all the right it could confer was a right of preemption perhaps. It receives no strength from the act of limitations, which was never designed to operate upon a possession of vacant lands; and such right of preemption was subject to be lost, if not exerted within a reasonable time, defined by the existing law. No length of possession could ever give a title to vacant lands, either before or since the Revolution: because the maxim with respect to the lands of the King was, *nullum tempus occurrit*; and therefore so far as regards the act of limitations, the possession of the ax-enterer, is to be laid out of the consideration of this case, as being of no avail whatsoever. As to the possession which *Spikes* had by his cattle, that commenced in the latter

part of the year 1763, or the beginning of 1764, there May 1796.
 were not full seven years even of that possession, previous to *Mr. Waddle's* departure to Europe; and besides during that time, *Waddell* passed through the land, and informed *Spikes* of his claim, so that it was not a quiet and peaceable, but a disputed possession. But what is a more complete answer, is, that the keeping of cattle upon lands, is not such a possession as the act meant to ripen into title. *Co. Litt.* 48 b. 2 *Rep.* 31 b. Such possession cannot be computed under the act of limitations, and if neither the possession of the ax-enterer, nor of the cattle, will serve them, neither will any such possession as they have proven subsequent to these, avail them.—*Spikes*, and those claiming under him, had actual possession only three years before the discontinuance of our Superior Courts in the year 1773; and soon after that period, *Mr. Waddle* went to Europe and died there. His sons did not return until several years after the war, nor came of age till just before the commencement of this action. The act of limitations expressly provides, that time shall not be computed under that act, in favour of a man in possession, and against him that is out of it and beyond seas, till after eight years; nor against an infant till after three years from his arrival to the age of twenty one years. Besides that, the time elapsed between March 1773, and the first day of June 1784, is struck out of the computation of time under the act of limitations. Then all the time that can be computed in the present case, is, the time elapsed between the actual possession, and the time of *Waddle's* going to England—a space of about three years only. Possession therefore, in any way in which they have proved it, will avail them nothing; and this case must be decided, as it would have been before any possession commenced, immediately after the issuing of the two grants. Our patent, for the reasons before given, is entitled to preference and the Plaintiff to recover.

E contra—It was argued by *General Davie* for the Defendants—No doubt can be entertained but that the land described in our patent, is the same land we now claim. The beginning and each line is proven by the chain carriers present at the original survey, and also at the survey lately made by order of this court; but it is extremely doubtful where the Plaintiff's land really lies—they have proven no beginning, nor any line which they

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May 1796. say is the boundary of their land. They have indeed proven the existence of a pine, marked as a corner tree, but the course of the line from thence to the swamp, though it will intersect our land, includes much more land than the line they have attempted to prove. The line which the witness speaks of, was a plain marked line. The line laid down in the plat is not a marked line. There is not a single marked tree in it or near it. It is very probable that this pine is not a corner of *Waddle's* land. The evidence says it was a corner of an adjoining tract. If the course leading to that pine be reversed, it will indeed be the course mentioned in *Waddle's* patent, but the evidence says it is the line of an adjoining tract. The surveyor says it was marked when this adjoining tract was surveyed. Still it may have been *Waddle's* line, but it does not terminate at any such corner as called for in *Waddle's* patent; and is continued much beyond the distance mentioned in *Waddle's* patent, as being the distance of the line of that course in the patent. These circumstances render it very improbable, that the lines described in the plat, and now claimed by *Andrews*, are really the boundaries of *Waddle's* land. It is probable enough, that *Waddle's* land is somewhere near to, or adjoining this land of *Spikes*; but it is incumbent upon them to show a better title than ours to the land in dispute. We have clear evidence that this land is included within the boundaries expressed in our grant, and unless they can as clearly prove that it is included within theirs also, we shall be entitled to retain possession—our evidence of title being not only equal but superior to theirs. In short, they must prove the location of their land, and that it runs over ours, or they can never be entitled to recover. The being able to raise a conjecture, that their boundaries do intersect ours, can never be deemed evidence sufficient to prevail against the positive proof of our title. But let it be granted that their boundaries do really intersect ours, it will not then follow that they are entitled to recover. Our grant is dated on the same day with theirs. Even admit the rule to be in general, that the first grant gives the best title, that rule is easily applied where the grants are of different dates, but it cannot be applied to the case now before us. It is impossible to say which of them was first issued. Any rule which pretends to ascertain this, will be merely fanciful.

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We should depart from the general rule when it no longer enables us to decide with certainty, and we should adopt some other that is most likely to attain justice. I know of none hitherto established for a decision of a case like the present, but none seems so likely to effectuate the purposes of justice, as to say where the priority of the grant cannot be ascertained, that the grantee shall be entitled to preference, who first purchased and paid for the land; and that this shall be ascertained where the entry is not to be had, and the priority of payment cannot be actually proven, by the priority of survey. The first survey itself forms some reason of preference independent of any other consideration in favor of the claimant under it—he first makes the appropriation of that particular spot to himself—he makes that appropriation notorious, by going upon the land and surveying it, and separating it from the circumjacent lands by visible boundaries.—These acts make known to the rest of mankind that he hath taken that spot for himself. It is unjust for any other to invade that right afterwards, and deprive him of it either by force or contrivance. These considerations have considerable weight in a case circumstanced as the present is. Where the ordinary rule of decision is found to be incompetent, the rule proposed, of giving preference to the grant first numbered, is too vague. It is impossible to say whether the grant first issued was that which was first numbered or registered, or whether the numbering takes place upon the execution of the grant, or after the execution when the Secretary registers it in his office. If for these reasons, or any other, our grant is to be preferred, the Plaintiffs have no title—but if this point be against us, our possession has made us a title; the ax-enterer was in possession five or six years, then Spikes purchased the location from him, and put in his cattle, and continued that possession till he began to clear and cultivate the land. This possession was previous to what they call the actual possession of Spikes, upwards of seven years, from 1757 or 1756 to 1770, nearly fourteen years; and by the act of limitations, seven years possession will give title to the possessor.

Per curiam—HAYWOOD only present—Will it not be proper to consider, whether if the act of limitations began to run from the time actual possession was taken, (which is stated to have been in the lifetime of Mr. Wadde, the patentee, and about three years before he went

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May 1796. to Europe) its operation can be suspended by his going beyond sea, or by his death, leaving infant heirs.

Counsel for the Plaintiff—*General Davie* and myself have formerly considered of that question. It is a rule adopted only in the case of fines in England—it does not apply to the act of limitations.

Per curiam—The court thinks it is equally applicable in cases subject to the act of limitations. There are many authorities to that effect, and the reason of the thing strongly supports that position. The court will inform the jury that is the law—if they should find accordingly, and you shall be of opinion, upon further consideration, that the law is not so, a new trial may be moved for, and the court will hear this point more deliberately argued. The counsel on both sides assented to this proposition.

Per curiam—The first point in order to be considered, is, whether the land in dispute be included within the boundaries of *Waddle's* patent. If it be, then other points will arise to be considered; if it be not, then the dispute is at an end. There is full proof that the land claimed, is within the boundaries of the patent under which the Defendant claims. This is not doubted by any one—it is not disputed by the Plaintiff. For them to recover, it is necessary to show a title superior to that of the Defendant—their patent is for land lying on the same stream, very probably for a part of the land in dispute—one of the chain-carriers in making *Spikes's* survey some weeks after, saw and shewed to *Spikes* a line then recently marked, running through the land contained in *Spikes's* patent; and as he describes it, must have run somewhere between the boundary of *Spikes's* patent and the line now described in the plat, and claimed to by the Plaintiffs—that line has been since spoken of, and admitted in conversation by the Defendant. When *Spikes* sold, he refused to warrant the land in dispute, because of *Waddle's* claim.

(318) The court then enumerated the other circumstance given in evidence relative to the corner pine, and the other line spoken of at the bar—and concluded this point by saying, it is not the province of the court to draw any conclusions with respect to this line, whether it existed, or where it is. Such conclusions can only be drawn by the jury. The court only recapitulates the evidence in the presence of the counsel, to assist the memory of the jury, not for the purpose of directing them to lay stress upon

this or that part of the testimony. Should the court deliver an opinion with respect to the evidence, the jury are only bound by it, should that opinion coincide with their own, drawn from the evidence they have heard—should the jury however, in the present case believe, that *Waddle's* patent covered the lands in dispute, then the next circumstance to be considered is, which of these two patents is entitled to preference—they are both dated on the same day, *Waddle's* is numbered with the number 4, and *Spikes's* with the number 73; but *Spikes's* survey was made several months before *Waddle's*. The rule that hath hitherto prevailed is, that the patent or grant of the first date shall be preferred. There is no other evidence of title by appropriation of lands, but that of the grant. He who first obtains his grant without fraud, obtains title; and from that moment may exclude all others from the possession. We cannot be influenced in determining a point of preference, by the first survey or the first entry, or the first payment of money for the land—any of these circumstances, or all of them together, make no title—if the grant does not follow, they signify nothing—and when it does follow, they cease from the moment of its execution to be of any consideration—that and that only, creates the title; and that only is to be consulted where the question of title arises between different claimants. Supposing this rule not to have been founded upon propriety at first, it would be attended with terrible consequences to alter or impair the force of it at this day—rules of property where they have once become fixed and known, and to be generally acted under, should never be broken in upon, but for reasons of the most urgent necessity, and then only by the Legislature. In such instances, it is of much more consequence that the rule should be certain and notorious, than that it should be conformable to strict notions of justice. Should we decide by preferring the grantee who had his land first surveyed, it might perhaps serve the purposes of a decision well enough in the present instance; yet many cases might occur, where the fact of the first survey could not be ascertained; as in the case of old grants issued before the practice of annexing plats began, and in cases of new grants, where the plat annexed to either of them was severed from the grant and lost. In all such instances, it would be necessary to adopt another rule of decision. It is better to follow one that will answer for the

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May 1796. decision of all cases which may arise—by adhering to the old rule of preferring the grant first perfected; and when they are dated on the same day, of preferring that grant, which from some circumstances apparent on the face of the deed, may appear the best entitled to it. In the present case, it appears in the face of *Waddle's* patent, that it was numbered with the number 4, whereas *Spikes'* was numbered with the number 78: from whence the strong presumption is, that *Waddle's* grant was first completed, and that it was numbered in the same order with respect to the other deed, in which they were severally completed; and if any other circumstance of equal weight, should appear in the face of the grant, it should have equal influence in deciding the preference. If *Waddle's* grant be entitled to preference, then it will be necessary to consider, whether *Spikes* or those claiming under him, have acquired a title by possession under the act of limitations. It is urged that the possession of the ax-enterer, as he is called, of whom *Spikes* purchased the location, is to be taken into computation: and next, that the possession which *Spikes* had by his cattle, is to be reckoned. We will consider them, separately, and for that purpose it is proper to state briefly, the true import and intent of the act of limitations, so far as it regards the landed estates of the country. That act had two objects in view—the one and principal object was, to fix upon a mode of settling disputes between different claimants of the same lands under different grants or titles.

The Legislature considered, where one of the claimants settled upon the land, and continued on it seven years, with the reasonable expectation of enjoying it in fee, that his deed or grant gave him, that it was more agreeable to justice and the policy of an infant country that wanted settlers, to confirm the title of such a possessor, than to suffer him to be turned out of possession by another, who had no other merit than that his grant was first dated. The term of seven years was fixed upon by the Legislature for that purpose. A prior patentee who would not enter, during the space of seven years, when the subsequent patentee, and those claiming under him, were in the actual possession, giving open and public notice of his claim, was by that law deprived of his title forever. He shall not take advantage of an industrious settler and turn him off, after he has improved the land for

seven years together : but then in order to gain a title by possession under this act, these circumstances must concur—he must be possessed of land which hath been actually granted : a possession of vacant lands will not do, unless attended with such circumstances as required by the late act of Assembly, for limiting the claim of the State—he must take possession with a belief that the land possessed is his own, as under a patent or deed, under some patentee—he must take possession with such circumstances as are capable in their nature, of notifying to mankind that he is upon the land, claiming it as his own, as in person or by his tenant—this notorious possession must be a continued possession—a secret taking possession and not continuing it, as it cannot answer the purpose of notoriety to adverse claimants, cannot extinguish their claim for not having been put in, in due time.—

The other object of the act was, to quiet the possessions of such persons as before the passing of it had taken irregular conveyances, not strictly supportable by law ; but yet fair, and for valuable considerations. This is provided for by the first clause of the act, and need not be enlarged upon now. The case before the court is no way affected by it. To apply these rules to the present case—the possession of the ax-enterer was of vacant and unappropriated lands, and is not a possession within the purview of the act. Such possession could operate, if at all, only against the King or the Lords Proprietors, not as the act meant, against another individual claiming under them by another grant or deed. It is not the possession of a settler, having a belief that the land he settled upon was his own. As to the possession which *Spikes* kept by his cattle, that is not such a possession as is calculated to give notice to the adverse claimant, that his land is occupied and claimed by another. Cattle may be a long time ranging upon land, without its being publicly known whose they are, or that they were put upon the land by their owner, or that he meant to claim it : but if a man settles upon the land by himself or tenants, and continues that possession, builds a house, or clears the land and cultivates it, his claim then becomes notorious, and gives fair notice to the adverse claimant to look to his title. As to the circumstance of *Spikes* having once taken possession of the land, and continuing there some time, and then leaving it again—

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May 1796. a single act of taking possession, and then leaving the land will not do; for then every man who has a patent or deed for land, and lives at a distance from it, is in danger of losing his title by some other person having a colour of title, making a secret entry upon it, and at the expiration of seven years afterwards, setting up that possession as a title. Were this the law, no man would ever be secure of his title for lands he did not actually reside upon, either by himself, his tenant or agent. The possession that is capable of ripening into title, must be notorious, and continued for seven years without entry, claim or action on the other side. As to the remaining possession that *Spikes* had—it is stated that about the beginning of the year 1770, or thereabouts, *Spikes*, or the person that claimed under him, took actual possession of the land in question, built a house upon it, cleared a field, and continued the possession down to the present day; and that on the other side, *Waddle* had no actual possession of the land included in his patent, or of any part of it; and that he was in this country when the adverse actual possession commenced, and for four or five years afterwards, when he removed to Europe. It is here proper to observe, that from the sixth day of March, 1773, to the first day of June, in the year 1784, the whole intervening time is struck out of the computation of time under the act of limitations, by different acts of the Legislature made in the time of the war and since, and is not to be regarded: and where a man is beyond seas when his title accrues, and is of full age, he is allowed eight years to put in his claim against an adverse occupant. In the present case, *Mr. Waddle* was in this country when the act of limitations first began to run upon him, that is to say, when actual possession was first taken and continued by the adverse claimant; and *Mr. Waddle* resided here for some years afterwards, and until after the discontinuance of our Superior Courts in the year 1773, so that at the time he went to Europe, the act had run upon him three years; and if we connect the sixth of March, 1773, with the first of June, 1784, excluding the intermediate time, and compute on till the time of commencing this action, which was some time in the year 1794, there will be a space of computable time of thirteen years and more, between the first taking of actual possession and the commencement of this action.

It is urged however, that there are two circumstances to interrupt the running on of this time, *Waddle's* being beyond sea, and then his death, and the infancy of his sons to a period within three years before the commencement of this action. These circumstances will not hinder the running on of the statute, when it has once begun to run. The act of limitations regards the interest of both parties—it provides the term of seven years to the end, the Plaintiff's claim be not destroyed by too short a time; for the safety of the possessor, it provides that his possession shall not be disturbed after seven years, unless there are strong reasons founded in justice to the contrary, and these are pointed out in the exceptions it makes to the general rule established by the act, as coverture, &c. &c. but these provisions would be easily frustrated, if a man after the act has run upon him almost the whole seven years, could defeat its operation by going beyond sea; and the act would have but little effect towards quieting titles and possessions, if after a man had been improving and cultivating the lands for almost seven years, that possession would be all rendered nugatory by the death of the adverse claimant, or by coverture, imprisonment or the like, before the time had been actually completed. We may easily suppose a case, where the act of limitations would not be of any assistance at all to a possessor as the Legislature intended it should be—a man improves land and settles upon it, and continues the possession for seven years, lacking a few days—the adverse claimant dies, his heir but just born, but a few days before his arrival to the age of twenty-four (for infants have three years allowed them after their infancy) dies, leaving his heir but just born also—here, contrary to the plain meaning of the act, the possessor could not acquire a title after 54 or 55 years continued possession. As such cases must frequently happen, the law will not allow itself to be defeated by making such use of its exceptions. The computation of time shall not be suspended by the occurrence of any of these circumstances which would have prevented its attaching, had the title of the party out of possession accrued during the time of their existence, as infancy, imprisonment, &c. but where the title comes to persons under such incapacities, and that title is already worn away by the attrition of several years time, with the quality of still wearing away, they must take it as

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May 1796 they find it, with its disadvantages as well as with its advantages, and must use the same diligence to prevent a total dissolution of title, as the ancestor or person from whom they claim was bound to use—and if this reasoning will apply to the cases of these persons whose hapless situation is not brought on by their own means, as infants, persons insane and the like, much more will it apply to the cases of those who seem to act, as if they intended to avoid the operation of the act, as a person imprisoned, he that removes beyond sea, or as a woman that marries after the act begins to attach. These voluntary acts of theirs, ought not in reason to defeat the possessor of the benefits intended for him, by the law of the country.—The conclusions resulting from this mode of considering the subject are, that the title of the Plaintiff in the present case, is barred by the Defendant's possession.—There was a verdict and judgment for the Defendant accordingly, and the motion for a new trial was not made. *Vide 2 Eq. Ca. Abr. 9. 2 P. Wil. 582. 1 Wils. 134.—Plow. 368 to 372. Stra. 556. 3 Bac. Ab. 655. L. Ray. 289. Co. Litt. 246 a. 259 a. 8 Rep 100 b. Litt 441. Cro. Jac. 101. 4 Term Rep. 310. Shep. Touch. 30. 4 Term 306, in a note. 2 Atk. 333. Co. Litt. 353 b.*

NOTE.—The position that the number of the patents or grants, when they bear date on the same day, may be considered in ascertaining their priority, seems to have been doubted of by WILLIAMS, Judge, in *Foreman v. Tyson*, post 496, though Judge HAYWOOD still continued of the opinion that the number should have some weight in the absence of other evidence of priority. This opinion of HAYWOOD, appears to have been approved of in *Riddick & Wife v. Legget*, 3 *Mur.* 539, though in that case, the grant of the lowest number was made to yield to a strong circumstance against it, to-wit, that the grant called for the lands mentioned in the other grant. Upon the question, what kind of possession is necessary to give title under the act of limitations, see the note to *Strudwick v. Shaw*, ante 5, and the cases there referred to: and particularly, as to the commencement of the possession being *bona fide*, see *Riddick & Wife v. Legget* cited above, and *McRee's heirs v. Alexander*, 3 *Hawks* 322. That where the statute of limitations once begins to run, nothing will impede its progress, is now well settled. See *Anonymous*, post 416. *Cobham v. Niel's Exr's*, 2 *Hay. 5 Pearce et al. v. House*, N. C. Term Rep. 305.

Den on the Demise of Henry Young v. James Erwin.

Where the demise in an ejectment is about to expire before a trial can be had, the Plaintiff will be permitted to amend, by extending the term.

Ejectment, brought several years ago, and hath depended so long that the demise laid in the declaration will

expire before the next term, there being a continuance at ^{May 1796.} this. *Mr. Taylor* moved a few days ago, on the court granting the continuance, to be at liberty to enlarge the demise, so as to extend it beyond the next term, or to the time when a trial will probably be had; and the court were about to allow the motion, when the counsel for the Defendant insisted, that the enlargement moved for could not be admitted, and prayed time for a few days, to prepare himself to shew it. Whereupon the court delayed a decision upon the motion for a few days, and now on the day appointed for the further consideration of *Mr. Taylor's* motion, the counsel, *Moore*, for the Defendant shewed cause against it.

The Judges in every free country are bound to decide according to the established law—they cannot make precedents where the seeming hardship of a case may appear to them to require it. Their office is to declare what is the existing law, not to say what it shall be in any particular case. Had they such a power, their discretion would be the governing principle, and the people slaves to their caprices. The laws of this country consist, partly of statutes made before the settlement of it, partly of what is called the common law, and partly of our own acts of Assembly. This common law is kept in remembrance, by the memorials of former decisions handed down to us in the form of reports, and they are the precedents for future decisions—so far as they ascertain what the common law is in any given case, so far are the Judges authorised to say what it is in that case; but they have no power to frame a new rule either against the former precedents, or without a precedent. The attention of the Legislature was drawn to the laws that were fit to be adopted here very soon after the formation of our present State Constitution, and they declared by the act of 1778, c. 5, that all such statutes and such parts of the common law as were heretofore in use within this territory, and all the acts of the late General Assemblies thereof, or so much of the said statutes, common law and acts of Assembly as were not destructive of, repugnant to or inconsistent with the freedom and independence of this State, and the form of government therein established, and which have not been otherwise provided for in the whole or in part, not abrogated, repealed, expired or become obsolete, are to be in full force within this State.

May 1796. If at any time since the commencement of our Revolution, the Judges in England have given a new rule of decision different from that which was understood to be law before that period, upon whatever reasons they may have proceeded either for drawing causes more and more within the arbitrium of the court, or to accommodate the law to the circumstances of that country, such decisions are not precedents for our courts to follow, nor can they follow them if they pursue the directions of the act of 1778; according to the directions of which, we are to receive as the common law, such parts thereof as were heretofore in force and use in this territory; so that in order to ascertain what is the common law here at this time, we must in every instance recur to what was the law here at and before the time of our Revolution. I make these remarks because the authorities that are to be relied upon for the support of the present motion, are almost all of them either so near to the time of our Revolution, that they had not been made public and adopted as rules of decision here, or have taken place at a time posterior to the discontinuance of our Superior Courts before the Revolution—they were chiefly made by *Lord Mansfield*, a man indeed of the most splendid talents, but rather too prone to innovation, and too much disposed to extend the powers of the court—his decisions on the subject now before us, are opposed to the determinations of Chief-Justice *HOLT*, who possessed as much firmness and knowledge of the common law as any Judge who ever sat upon the English bench. They are opposed also to the determinations of all the other learned men who preceded him. One of the cases to be relied upon, was a case decided in June, 1769, *Doe*, lessee of *Hardiman* v. *Pilkington* and *Russel*. 4 *Bur.* 2447. There the demise was enlarged. The case was so circumstanced that the Plaintiff would have been barred by a fine had he been put to bring a new ejectment. The case now before the court is not circumstanced like that; but if it was, we have no evidence that that decision was ever held by the courts in this country to be law in force and use here—but more particularly it is against the current of authorities prior to that time. He then cited a case from *Coke's Reports*, where the court refused to enlarge the demise in a declaration in ejectment, saying it was a substantial part of the declaration. He also cited *Carth.* 178. 1 *Vent.* 361. 2 *Barnes* 13. 1 *Show.* 207. *Carth.* 400, 402. 2 *Vent.* 321.

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Salk. 257. Chief-Justice HOLT, upon such a motion, May 1796.
 observed, he had no notion of building a new clock-house
 —alluding to the fine set upon Judge HINGHAM—thereby
 intimating his clear opinion that the motion was not al-
 lowable. Chief-Justice HOLT, and the other Judges be-
 fore his time, thought the demise in a declaration in
 ejectment, was matter of substance—it was the very thing
 the Plaintiff recovered. If the term was expired, there
 was nothing he could recover. The ejectment now used,
 is the same proceeding as was then used—if the demise
 was a matter of substance then, it is now. It cannot be
 said to be immaterial, and matter of form only. Should
 it be totally omitted out of the declaration, the Plaintiff
 could not recover. The principal question in an ejectment
 is, could the lessor make the lease laid in the declaration.
 If it is stated to be the joint lease of several lessors, and
 any one of them hath not a legal interest in the whole,
 he cannot in law be said to demise the whole—it is only
 his confirmation, and there can be no recovery upon it
 —the lessors have such a title as enables them to make
 the lease stated in the declaration. If it be stated as a
 joint lease by two, and upon trial it appears that one is
 tenant for life, with remainder to the other in fee, the
 Plaintiff cannot recover—the remainder man has not a
 title that will enable him to make the demise laid in the
 declaration; for each could not demise the whole. *Cro.*
J. 613. 6 Re. 14, 15. a, and other books. All these cases,
 and they are uniform for ought I know, up to the time of
 the Revolution, tend to shew that the demise in a declara-
 tion in ejectment, hath always till these modern decisions
 took place, been considered as a substantial part of the
 proceedings, so that if the demise laid in the declaration
 could not entitle the Plaintiff to recover, he could not re-
 cover at all. If the lessor had no right to make it, or if
 one of several lessors had no right to make it, if it was
 made after the ouster complained of by the lessee, if the
 time of its commencement was not ascertainable, or had
 not yet arrived; or if it had expired—in all these cases,
 according to the ancient authorities heretofore followed
 in this country, the Plaintiff could not recover; and they
 were such substantial parts of the declaration, that the
 court could not suffer them to be amended. These au-
 thorities were received as evidences of the common law
 in force and use here prior to the act of 1778, and which
 is again enforced by that act. Our courts since the Re-

May 1796.  volution have thought so, and I do not recollect a single instance where they have suffered the demise to be enlarged. I remember a case that happened in this court not many terms ago, where Judge WILLIAMS refused a motion of this sort, and I must submit to the court whether it is proper for them to establish a new precedent against the uniform tenor of all the adjudications up to the time of *Lord Mansfield*, and as it seems to me, against the express provisions of the act of 1778.

E contra, it was argued by *Mr. Taylor*—It is not contended on the part of the Plaintiff that the court has the power of making law, nor do we ask that they shall depart from established precedents, nor that they shall ascertain what the common law is, by other means than those which have always been hitherto recognized as the proper ones. Our common law is the same common law that the English nation have, the different parts of which have been ascertained by judicial determinations at different periods, and preserved in the books of Reports; or are contained in maxims and general principles which supply the means of making a proper decision, where none hath hitherto been made. These principles or maxims have their foundation in natural equity, and are adapted to the physical situation of mankind. They are the solid pillars upon which the whole structure of the common law stands. These maxims will always point out a proper decision, where no express decision hath already been made; and the Judges are at liberty to resort to them to correct the improprieties, or supply the imperfections of decisions already made. Such is the nature of man, that from a thousand causes he is perpetually subject to err, and he frequently does so with the best, as well as sometimes with the worst motives. Judges, however virtuous or wise, are subject to this common infirmity of human nature, equally with the rest of their fellow men. If under the influence of a prevailing cause or error of the times, they have made even a series of decisions not reconcileable to the general maxims of the common law, the Judges of after times, when the obstacles to a just decision are removed, may examine the foundations of those former decisions, compare them with the maxims of the common law, and if not found genuine by that standard, may either reject them *in toto*, or alter them upon proper reasons, so as to reduce them to a state of

compatibility with common law principles. Look into May 1796.
the law books from the earliest times, and see how that
which hath been supposed to be the common law in a
great variety of points, hath undergone successive changes
by subsequent determination, founded, as mankind
have admitted by their acquiescence, upon better reasons;
yet it would be improper to say the common law is altered—
it is only better ascertained as mankind have gradually
acquired greater lights, more freedom for discussion
and a wider space for the exercise of the mental powers,
in proportion as the tyranny of superstition and of government
have worn away, and opened to the discovery of
mankind, the way to truth. These two circumstances
will account for the repugnance of many of the ancient
decisions to the maxims of the common law. They will
at the same time evince the propriety of what every lawyer
knows to be a fact, that the more modern decisions
are held to be the best evidences of what the common law
is. Indeed, nothing can afford a stronger proof of the
justness of these observations, than the history of amendments
at the common law, alluded to by Chief-Justice
Holt, in one of the Reports cited on the other side. It
proves the influence a particular cause may have in forming
the decisions of the day. He refused the motion
not because it was unreasonable, but as it tended to the
alteration of a record, and as he had no mind to build a
new clock-house. *Edward* the first, after he had been
some time in the French dominions, returned to England,
and as it is supposed wanting money, found it convenient
to prosecute his Judges—his pretext was, that they
had altered their records. They were ruined by the enormous
fines set upon them, and Chief-Justice *Hingham*,
among the rest; and it was afterwards a tradition, that
with this fine, a clock-house was built, from which the
clock might be heard into Westminster-Hall. This gave
such a shock to the succeeding Judges, that though formerly
the Judges would alter their records so as to make
them speak truth, they would now no longer touch a record
after it was made up—and this rule, really contrary
to the common law, was so strictly adhered to, that it
has been the work of many Parliaments and ages, by a
great variety of statutes allowing amendments, and authorising
Judges to get over nice exceptions, to get the
better of it—although it had its origin not in any principle

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May 1796.  ple of the common law, but in the arbitrary exercise of royal power, actuated by the avidity of the princely office. Can any example more strongly evince the propriety of re-examining former decisions, and trying them by common law maxims? Can any example more satisfactorily prove that the modern decisions, where variant from the old, are worthy of our consideration? Neither the old nor the modern decisions are the very common law itself—they only profess to ascertain what it is. It is more reasonable to be governed by decisions made upon an examination of all the prior cases, and of their reasons and grounds, compared with the maxims of the common law, the general principles of reason and justice, and assisted with all the new lights that are furnished in modern times, than adhere implicitly to the old decisions, as if they were the very common law itself—although in fact they are directly opposed to it. Then what is the common law by which we are to be governed? It is that common law we imported from the mother country, received here before the Revolution, and discoverable by judicial decisions, founded upon reasons consistent with its fundamental doctrines—which decisions are as likely to be found in the modern as in the ancient reports—and as to the modern decisions, if they are to be regarded, there are many of them to be found that will justify the amendment moved for on the part of the Plaintiff. I will cite one, *Burr. Rep.* 2447. There upon a motion made to enlarge the demise before trial, and upon argument all the former cases were cited on both sides, and the amendment was made by permission of the court. There are other cases to the same effect, but it is needless to go into a recital of them. This is in point for us, and is subsequent to all the cases on the other side; and as we contend, is a proof of what the common law really is in this point. The action of ejectment is no more than a fiction throughout. It depends entirely for all the efficacy it has, upon the rules of the court. It is perfectly under their power to be moulded into such shape, and so controlled by the rules of the court, as to be made to answer the only end it has in view—the trial of the title between the parties, fairly, without any improper advantage allowed on either side. The demise is a mere fiction, and only inserted for the purpose of putting the real Plaintiff to prove that he had such a title as gives him a right to make a demise of the nature of that stated in

the declaration: but whether that demise be for a long- May 1796.
 er or shorter time, is totally immaterial as to the point to
 be tried between the parties; and there can be no founda-
 tion in justice to say, that a slip in laying the fictitious
 demise for a shorter time than the cause can be brought
 to trial in, shall be so prejudicial to the party, as that
 he shall be nonsuited, and compelled to pay all the
 costs of the suit, for no other purpose, than that he may
 be at liberty to insert a demise of the same nature, but
 for a longer time, in another declaration. Such niceties
 are not calculated to promote, but to defeat the ends of
 justice—they do not enhance the value of the common law,
 but depreciate it—they do not beget reverence for the
 courts of justice, but discontent and murmurings against
 their proceedings—they deserve not the countenance of
 this court, much less that the court should go about to re-
 ject decisions which have been made against them. As to
 the practice of our courts since the Revolution, I am not
 able to say, what it has been. I have understood it to
 have been the practice to enlarge the demise when appli-
 ed for, before the trial began. I remember the case al-
 luded to by *Mr. Moore*—there the motion was made after
 the jury was sworn, and Judge WILLIAMS refused to per-
 mit the amendment for that reason.

The counsel for the Defendant replied.

Per curiam—Formerly, demises in declarations in E-
 ejectment, were enlarged only by consent, and not other-
 wise. A different practice began to prevail in the Eng-
 lish courts, in the latter part of the reign of *George II.*
 and hath continued hitherto. It very probably prevailed
 here also. The first instance was in the twenty-first of
George II. reported in *Strange*, 1272. A distinction was
 made about this time, between the cases where judgment
 had been given and where not. If it had been given, the
 record was made up and could not be altered. After-
 wards, a distinction was made between the cases where
 the motion to enlarge was made pending the ejectment,
 and where after. In the latter case it could not be alter-
 ed, for that would be to make a new term, and not to en-
 large the old. These distinctions seem to have been a-
 dopted, to get at an amendment without infringing for-
 mer decisions—some of which had decided, that the en-
 largement could not be made where the motion was after
 the term expired. However, since these distinctions pre-

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wailed, there have been other decisions in favour of enlarging the demise, without regarding the former rules. In the first of *George III* the demise was laid to be in the 33d of *George III*—after verdict, the court upon argument, allowed the demise to be amended: there, the term was not commenced at the time of the trial. There was another case, *Cowp.* 841, where the demise was enlarged after judgment. In the 14th of *George III*, the term was expired and allowed to be enlarged. 2 *Bl. Re.* 940, 941. The court there said, an ejectment is the creature of the court, and open to every equitable regulation for expediting the true justice of the case. These decisions were declarations of what the common law was long before our Revolution. They were most probably received here—and if only such decisions as took place before the Revolution, are evidences of the common law under the act of 1778, still the amendment may be made. It seems highly proper upon the reason of the thing, that amendments of this kind should be made. The demise is but a fiction—it is not real. The only question in ejectment is, has the lessor such a title as can enable him to make such a lease as that stated in the declaration—if he has, he ought to recover. The term of the demise is immaterial. Whether the demise be for a longer or a shorter time, the party's title is in no wise altered or affected by that circumstance—and if in general such alterations ought to be made for expediting justice, there are very ample reasons why it should be made in the case now before the court. This demise was laid to be of five years continuance, and by the delays of the court that time is expired, or is likely to expire before the cause can be tried. The Plaintiff had reason to expect his cause would be tried before the expiration of five years. He has been in no fault. It is not owing to him that the cause has not been tried. Shall he then be turned round to begin his cause again? Surely it would be the excess of injustice to say so. There are cases enough to warrant the amendment, and it will operate no hardship upon any one—wherefore, let the demise be enlarged, and it was enlarged.

NOTE.—*Vide Faircloth v. Ingram*, post 501. *Adams on Eject.* 203, 204.

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McNaughton's Executors v. Moseley.

The jury returned to give their verdict, and said they found for the Defendant—*Mr. Hay* for the Plaintiff,

prayed before the verdict was entered, that the Plaintiff ^{May 1796.} might be called and nonsuited. *Mr. Moore*, for the Defendant, said it could not be done after the jury had delivered their verdict, though before it was recorded.

HAYWOOD, Justice, I am very clear it may be done at any time before the verdict is recorded. *Mr. Moore*, I am as clear it cannot be done, and I pray time to argue it and produce authorities.

Per curiam—Let the verdict be recorded, subject to be set aside if the Defendant's counsel do not shew that a nonsuit cannot be taken after the jury have said for whom they find. The verdict was entered, and afterwards a new trial was moved for and granted for another cause.

NOTE.—The Plaintiff is demandable when a verdict is to be given. *Co. Litt.* 139, *a.* 3 *Bl. Com.* 376, In which latter book it is said, when the jury return back to the bar, and before they deliver their verdict, the Plaintiff in person, or by attorney, is bound to appear to answer the amercement, and if he does not appear no verdict can be given. *5 Mo.* 208. After a general verdict the court will not suffer the Plaintiff to discontinue his action. *2 H. 4 c.* 7, provides that Plaintiff shall not be nonsuited after a verdict, though he might at the common law, if he did not like his damages. *2 H. P. C.* 184, says it is the opinion of some books, that the Plaintiff may be nonsuited at the common law at any day of continuance before judgment, though that is altered by *2 H. 4, ideo querere*—What is the meaning of the words "after verdict given?" Whether it can be said to be given, before it is received by the court and entered of record, previous to which stage the jury may retract or alter it; neither is it complete till the record of it be read over to them, and assented to as recorded.

Anonymous.

Articles for the conveyance of land upon the payment of money, will not create such a trust on the part of the Plaintiff (at least before the money is paid) as to prevent his recovering in ejectment from the person to whom the articles were made.

This was an action of ejectment. Upon the trial of which the Plaintiff produced his deeds, and proved a clear title in himself. On the side of the Defendant were produced articles for a sale of the land, signed by the Plaintiff: in which it was agreed, that the Defendant on payment of so much money, should receive a title from the Plaintiff—and Defendant's counsel said he could prove payment of the money. It was denied on the side of the Plaintiff that payment had been made, and the Defendant's counsel stopt here without attempting to prove the payment. He argued that the Plaintiff ought not to recover—for no man can recover against his own

May 1796. solemn deed, covenanting for further assurances or quiet enjoyment; and this agreement being under seal, is tantamount to such a deed. He cited *Cowp. 597. Goodtitle* on the demise of *Edwards v. Bailey. E contra*—It was argued that the only question now before the court is, whether or not the Plaintiff has the legal title. He has shewn his title at law, and what is shewn on the part of Defendant, is not such a conveyance as will pass it out of him. It is not pretended that the writing produced can be brought under the denomination of any of those deeds that the law recognizes as a conveyance of title. Whether the Defendant has an equitable title is not now necessary to be considered. This court will not enquire into the equitable title of the Defendant upon a trial in ejectment. If he hath an equitable title only, this court has no jurisdiction in such a case—it not being competent by the rules of law to give relief—it would be nugatory in them to enter into any investigation of that circumstance; neither is the case before the court similar to that cited on the other side—this is not a covenant for further assurance or quiet enjoyment, it is only a conditional agreement to make a title when the money shall be paid; and it would be directly in the face of the agreement to say the Plaintiff shall be divested of his title before he hath received the money. If he cannot recover now against the Defendant, neither would he have a right to recover against the vendee of the Defendant, and he would be totally deprived of the security he has reserved by the terms of this agreement.

Per curiam—Let the jury give a verdict for the Plaintiff, subject to the opinion of the court upon a statement of the facts proved on the case.

This was consented to by the counsel on both sides—a verdict was given accordingly, and a statement made *ut supra*. Three or four days afterwards the court gave judgment.

Per curiam—We have considered of this case, and the authorities relative to the point that was stirred in it.—4 Burr. 2208. *Right* on the demise of *Green v. Proctor*; and *Cowp. 597.* cited at the bar upon the argument, go upon this ground—where there is an absolute unconditional agreement by deed on the part of the Plaintiff, that the Defendant shall enjoy the premises, he shall not be permitted to invalidate that deed by recovering against

it. It is unreasonable that he should. When the deed is fairly executed, and cannot be impeached for fraud, it is evidence of good consideration passing from the Defendant to the Plaintiff, which makes the Plaintiff a trustee of the legal title for the Defendant, at least during the time the contract is to last. In the present case, there is no absolute unconditional agreement that the Defendant shall have and enjoy the possession. He is to have a conveyance when he pays the money. This implies most strongly, that he is not to have it before.—There is another class of cases however, into which those before cited seem to enter—they decide that a trustee shall not be permitted to recover in ejectment against his *cestui que trust*; and that a vendor of lands is a trustee for the vendee. One of these cases is reported in *Cowp.* 473. The reason the court gives why they will not permit the Plaintiff to recover is, because to do that would only be to give the Court of Equity an opportunity of undoing all again by setting it right. Courts of Law now take notice of these trusts to prevent delay and expence to the suitors by sending them to Equity. Others of these cases reported in *Doug.* 776, *Durnford* and *East.* 735, but in these cases the rule is laid down to apply where the Plaintiff is clearly a trustee, so circumstanced that a Court of Equity would decree a specific execution of the agreement—there he shall not recover; but if it be not clear but doubtful whether he be such a trustee or not, a Court of Law leaves that enquiry to the court that has proper cognizance of trusts, and will not take any notice of it upon a trial in ejectment. To say in a Court of Law, that a trustee shall not recover in ejectment against his *cestui que trust*, is going perhaps full far enough; perhaps further than the rules of the ancient common law would warrant. Had this rule indeed prevailed formerly at law, it is probable the Court of Equity would not now have been in possession of that jurisdiction, to which the delay and expence of an application, has latterly induced Courts of Law to adopt the rule established by those decisions—and though perhaps were this a clear trust, this court, for the same reasons that weighed in these cases, might now adopt the same rule, yet we are of opinion this is not a case of a clear and undoubted trust—the vendor only becomes a trustee where the vendee has actually paid him the money—here he has not paid the money—the non-payment of the

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May 1796. money is the cause of this action—the vendor by the express terms of the agreement is not obliged to make a conveyance until payment of the money. This is so far from being the case of a clear trust, that it is rather clear the other way; and upon principles of common justice, we should not be warranted in saying the possession should be taken from the Plaintiff, or denied to him, when his agreement evidently implies the contrary—wherefore let the Plaintiff have judgment. Judgment was entered for the Plaintiff accordingly.

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NOTE.—*Vide Adamson Ejectment, 32, 33. Read v. Read, 8 T R. 118.*

Executors of Davis v. Wilkinson et al.

By the act of 1789, *Rev. c. 314, s. 4*, the surviving obligor and executors of the deceased may be sued jointly.

Vide
Brown,
Campbell
& Co. v.
Daniel
Cleary &
Jas. Craig
ante 107.

This suit was brought against the executors of a deceased joint undertaker to pay, and the survivor. There were several other suits on the docket of this court thus circumstanced, being suspended by motions in arrest of judgment, and special cases, until a decision could be had upon some one of them. The doubt arose upon the construction of the act of 1789, c. 57, s. 5. “And whereas it is a rule of common law, that in case of the death of a joint obligor, the debt can never survive against his heirs, executors or administrators; which rule frequently is injurious and oppressive to the surviving obligor or obligors: to remedy which be it enacted, that from and after the passing of this act, in case of the death of one or more joint obligor or obligors, the joint debt or contract shall and may survive against the heirs, executors or administrators of the deceased obligor or obligors, as well as against the survivor or survivors; and when all the obligors shall die, the debt or contract shall survive against the heirs, executors and administrators of all the said joint obligors.

Jones for the Defendants—This act was made for the benefit of the obligee or creditor, as well as for that of the debtor. It was for the benefit of the obligee that he should not be confined to the survivor, as he perhaps might be insolvent or not to be come at, but that he might resort also if he chose to the executors of the deceased, who perhaps were solvent and within the reach of process.—The old rule was frequently injurious to the surviving

obligor where he was only a surety—the creditor was obliged in the first instance to take his remedy against him. The act meant to remedy these mischiefs, by enabling the creditor to sue either the one or the other at his election; with this view it says, the debt shall survive as well against the executor as the survivor—not that it shall survive against both jointly, but it is to be a debt chargeable upon one as well as, that is to say, in like manner, as against the other or survivor. How did it survive against the survivor, at the time of passing this act? Why, against him severally and jointly, with the other—as to him, there is no alteration by this act—he stands as he did before. The act professes to be made for his benefit, but if he is still jointly to be sued with the executor, he is no more exempted from suit than before. Whether only a surety or a principal, the injury complained of in the preamble, as to him, remains nearly the same; and as to the executors, if they be the executors of a surety, they are in a worse situation than before, if they are now necessarily to be sued under this act. As to the creditor, he too, in many instances, is placed in a worse situation, if he must now sue the executors together with the survivor, when they are not perhaps amenable to process, which must be continued to the *pluries* before he can proceed against the survivor who is on the spot. The creditor will be delayed longer than if this act had not been made—how is it beneficial to the creditor to say, you shall sue both, when by so doing, he will be greatly delayed, and when, but for the act he might proceed to judgment immediately against the survivor? But if the act gives election to sue either the one or the other, as I contend it does, then the creditor receives a benefit from it which he had not before: he may sue the real debtor only leaving out the innocent surety, and he may proceed without the delay incident to suing them both—the other construction subjects to all the inconveniences just now pointed out. Some argument may be drawn from the words of the sentence next following—“And in all cases of joint obligations or assumptions of copartners and others, entered into after the passing of this act, suits may be brought and prosecuted on the same, in the same manner as if such obligations or assumptions were joint and several.” The Legislature provides for cases before the act, and for cases after it; with respect to the latter

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May 1796. the remedy shall be joint and several—is there any reason, why they should wish it to be joint only in the former cases, and to alter it from several, as to the survivors, to joint against them and the executors? The Legislature evidently considered that to make the remedy several, was essential to the purposes of justice, or why did they say in this sentence that a joint assumption sh'd be several also? And if they did consider it essential to justice that it should be several as well as joint, why in the preceding sentence have they intended to alter the several remedy, into a joint one? Not to say any thing of the uncommon judgment that such a suit as the present, must necessarily require, the smallest consideration upon that point only will serve to show the confusion that a different construction of the act would produce.

(356) *E contra*—It was urged that the point now in controversy had been settled at Salisbury, upon argument in the case of *Brown, Messrs. Campbell & Co. v. Daniel Cleary & James Craig*, administrators of *David Craig*, September term, 1794.

Curia advisari—After a few days taken to consider, they gave judgment.

Per curiam—We have looked into the case cited at the bar the other day, decided at Salisbury—it was a case decided upon argument by Judge ASHE and Judge WILLIAMS—we are satisfied with the reasons of that decision as given by Judge WILLIAMS. Wherefore let judgment be entered for the Plaintiff, and it was entered accordingly. Then the Plaintiffs in all the other suits depending upon the decision of this point, entered up their judgment also.

NOTE.—*Vide Brown, Campbell & Co. v. Clary & Craig, Adm'rs.* and the note thereto, ante 107.

Glisson v. the Executors of Newton.

Defendant had been awarded to pay Plaintiff a certain sum, but at the day of payment, not having the money, he agreed with Plaintiff to give more than six per cent. for indulgence: and a bond was given for the principal sum, and the amount above the legal interest was paid partly in money, and a note given for the balance:—Upon an action on the bond, it was held, that the transaction was usurious and the bond void.

Debt upon bond, and the statute of usury pleaded.—Upon evidence it appeared, that disputes existed between

the Plaintiff and Defendant, relative to a tract of land ; May 1796. that they agreed to submit these disputes to arbitration ; that the arbitrators awarded *Glisson* to give possession of the land to *Newton* at a prefixed day ; and that on the same day, *Newton* should pay ninety pounds to *Glisson*. On the day appointed, *Newton* being unable to pay the money, proposed that *Glisson* should give time for payment, about eleven months longer ; for that forbearance he would give a premium of 25 dollars, and moreover, pay the legal interest—this proposal was accepted by *Glisson*. Whereupon, the bond in question was drawn, payable at a day, about eleven months from the date, and *Newton* paid down 13 dollars, and gave a separate note for the balance of the 25 dollars.

It was argued by *Slade* for the Plaintiff, that this was not usury to avoid the bond—usury could only be committed on the loan of money ; and this was not a loan, but a giving a further day of payment for a sum already due from the Defendant. It is not usury for another reason—the act says, “And that all bonds, contracts and assurances whatsoever, made after the time aforesaid, for the payment of any principal or money to be lent, or covenant to be performed, upon or for any usury, whereupon or whereby there shall be received or taken, above the rate of six pounds in the hundred as aforesaid, shall be utterly void.” Now upon the bond which is the foundation of this suit, there is not any thing reserved more than the legal interest ; nor thereby is there reserved or taken more than lawful interest ; and therefore the bond is not within the words of the act so as to be made void by it, whatever fate the note might undergo, were a suit instituted upon that. To the first part of his argument, he cited *Cowp.* 772, 113.

Sampson e contra—Where a man has my money in his hands, and I agree to give him day of payment for it, that is as much a loan, within the meaning of the act, as if I had actually advanced him that much money, and this seems to be admitted in one of the cases cited from *Cowper*. Then when this bond was taken, there was a loan for a less time than a year, and upon the contract, which is the parent of the bond, there is a reservation of more for giving day of payment—much more than the act allows. The case of the Plaintiff is no way bettered by taking a separate security for the excessive sum. Would

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May 1796. that serve to evade the act, nothing were more easy than to avoid the effect of it, which has been hitherto supposed so difficult and indeed impossible to be eluded. He cited 1 *Haw. P. C.* 248, and a case from *Croke's Rep.* 2 *Cro.* 507—*Roberts & Fremain*—where there were two instruments, one for securing the principal sum, the other for securing the unlawful interest; and *Doug.* 235. These authorities are directly in point to the question now before the court, and decide it in favour of the Defendant. Some of them are expositions upon the 12th *Anne*, from which our act is copied *verbatim*—the construction upon that act, is a construction upon ours. Upon these authorities, I submit the case of my client to the court.

Per curiam—We wish for time to consider of this question; and that a special verdict or statement of facts in some form may be made, that will put it in our power to pass judgment hereafter, when we shall have had time to look over the authorities cited, as well as any others that may tend to throw light upon the subject. This was agreed to by the counsel, and a special verdict found, which stated the above facts. After some days taken to consider, the court gave judgment.

(338) *Per curiam*—We have considered of this case with attention, and have looked over the authorities upon the subject, as well those cited at the bar, as also a case in 3 *Term*, 353, and other cases found in the different Reports. We have in fact, been averse to declaring this to be a case of usury within the act, because in that event, the principal sum secured by this bond, which is a just debt, will be lost as well as the unlawful interest secured by the note, but the authorities in the books are too strong to be surmounted. Any shift or device whatsoever, to take more than the interest allowed, and particularly the device of securing the principal and interest by distinct assurances, is incompetent to the purpose of taking the case out of the operation of the act. If the contract itself, is upon the whole face of it, a contract to have a greater premium than the law allows, it is void, whether it remains a parol contract, or becomes clothed with legal solemnities; as is also, every security or assurance founded upon it, whether one only, or more. This is the true meaning of the act. Without any adjudged case, we should be bound to decide in the same manner—were

the act to be evaded by so simple a contrivance as that of taking two securities, the one for principal, the other for the unlawful premium, it would answer no purpose whatsoever. The 13 dollars received, is above the rate allowed by law—and should we decide that the contract is not usurious, so as to avoid the bond, immediately the Defendant may sue for the double value, upon the last clause of the act. Wherefore let judgment be for the Defendant, and it was entered accordingly.

NOTE.—*Vide Carter v. Brand, Conf. Rep. 28.*

Executors of Cruden v. Neale.

Plaintiff sued on a bond, and the plea, which was founded on the 101st section of the act of 1777, c. 2, stated in substance that Plaintiff had removed from the State to avoid assisting in the war of the Revolution; that he had attached himself to the enemy, &c. *Held*, that if Plaintiff was a citizen of this country, the 101st section, before referred to, is repealed as to him, by several acts of the State Legislature; and if he was not a citizen, but a British subject, then by the 4th article of the treaty of peace, he is considered as an alien friend, and entitled to sue in our courts.

The plea in substance stated, that the Plaintiff in the year removed himself from this State to avoid giving his assistance in the then war, carried on against the King of Great-Britain, and attached himself to the enemy, &c. and the plea concluded with praying judgment, whether he should be answered, &c. To this there was a demurrer and joinder.

Counsel for the Plaintiff—It will not be denied, and is admitted by the pleadings, that the Plaintiff previous to the Revolution resided in this country; after the establishment of the present form of government he can be considered but in one of these two lights, as one who refused to become a member of the new government, continuing his allegiance to the King of Great-Britain, or as a citizen. When a change of government takes place, from a monarchical to a republican government, the old form is dissolved. Those who lived under it, and did not chuse to become members of the new, had a right to refuse their allegiance to it, and to retire elsewhere. By being a part of the society subject to the old government, they had not entered into any engagement to become subject to any new form the majority might think proper to adopt. That the majority shall

May 1796. prevail, is a rule posterior to the formation of government, and results from it. It is not a rule binding upon mankind in their natural state. There, every man is independent of all laws, except those prescribed by nature. He is not bound by any institutions formed by his fellow-men without his consent. The Plaintiff here is not stated by the plea ever to have become a citizen or member of North-Carolina. The fact is that he never was a citizen. Had that fact been stated, we should have replied to it. As he still remained a subject of the King of Great-Britain, then although the intervention of war suspended his right to commence an action in our courts, that was but a temporary obstacle, ceasing with the war which caused it; his right revived when the war ended. The clause upon which this plea is formed is, the 101st section of 1777, c. 2. "Provided, that no person who hath taken, or shall take part with the enemies of America, or who hath, or shall refuse, when lawfully required thereto, to take the oath of allegiance and abjuration required by the laws of this State, or who hath or shall remove from this State, or any of the United States, to avoid giving their assistance in repelling the invasions of the common enemy, or who hath or shall reside or be under the dominion of the enemies of America, other than such as are detained as prisoners of war, nor any person claiming by assignment, representation or otherwise by or under any such person, shall have or receive any benefit of this act: but all right of commencing or prosecuting any suit or suits, action or actions, real, personal or mixt, shall be and is hereby suspended, and shall remain suspended until the Legislature shall make further provision relative thereto." This is but a declaration of the Legislature so far as regarded British subjects, of what the law of nations was; and it was intended to operate no longer than the law of nations would have operated to the exclusion of the Plaintiff from our courts, namely, during the continuance of the war. The clause says, the Plaintiff's right shall be suspended until the Legislature shall make further provision relative thereto; and it must be admitted there is not any express provision made by the Assembly since; but being made with a view to the continuance of the war, and this State having afterwards made one of the United States who entered into a treaty for the termination of that war, it follows, that all the acts of our Legislature made for the

purpose of distressing the enemy, or to prevent their strengthening themselves, were thereby *ipso facto* repealed. Though the State represented in the Assembly have not by that Assembly expressly passed an act of repeal, yet the State represented elsewhere hath agreed to and ratified a public act, which does away all the consequences arising from a state of warfare—of which the Plaintiff's disability to sue in this court, is one. Where that body, with whom is lodged the sovereign power to make a treaty of peace, makes such treaty in a constitutional manner, it is an act of the Legislature as to the purpose of repealing all former acts of every State Legislature to the contrary. It is an act of the people of all the States, done by those who are constitutionally empowered to do it; and all acts opposed to that state of things, introduced by the treaty must cease, or each State may still treat as enemies those with whom the treaty directs a restoration of the rights of peace. Can a man be entitled to the rights of an alien friend, and yet not be allowed to sue in our courts? Can any man who lived under the dominion of the King of Great-Britain during the time of the late war, be entitled to sue in this court, if that clause is not repealed by the treaty? But if this law is not repealed by a discontinuance of the war, by means of the treaty and a restoration of peace, yet certainly as to British subjects it is repealed by the fourth section of the treaty of peace—creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted. By this article, British creditors have a right to recover their debts, and they cannot recover them but by means of suits to be instituted in our courts. This article, with the rest of the treaty, by an express act passed in 1787, is made part of the law of the land; and if the operation of the treaty is inconsistent with the 101st section of the court law, it follows that that section is repealed, so far as the inconsistency reaches; and then the plea is not tenable, and ought to be overruled by the court. But suppose the Plaintiff was a citizen of this State, then how is this 101st section to be viewed, upon a comparison with the constitution of this State then just established? If he was a citizen, and attached himself to the enemy, and aided them in their attempts to subjugate the country, he was guilty of high treason—the consequence would be the loss of his right to institute an ac-

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May 1796.  tion. Judgment of death, forfeiture of estate, and a disability to apply to his country for relief against the injustice of others in civil cases, will be the consequences of the fact stated in the plea. But can such a fact be presumed? Can it be averred against a man who has not been convicted of it? Can it be tried indirectly in a civil action? These questions cannot be answered in the affirmative. Then this plea should have stated the fact with such circumstances as were necessary to establish it. It should have set forth the record of the Plaintiff's conviction and attainder. Where a man becomes a citizen of a free country, his right to demand justice and redress of wrongs becomes at the same time one of his most essential privileges. He cannot enjoy safety and the protection of the laws without it. Without it he is not free, for what is freedom but security rendered by law to the individual. It is not denied but that every citizen may forfeit his right to protection by enormous transgressions against the laws of his country, where they have exacted such a forfeiture as a part of the punishment. A citizen of North-Carolina may forfeit his right of protection by the commission of high treason, but whether he has committed high treason or not, can no otherwise be ascertained but according to the rule of the constitution, which declares, sec. 9, that no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used. And sec. 12, that no freeman ought to be taken, imprisoned, or deprived of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of life, liberty or property, but by the law of the land. A citizen of this country before he can be subjected to the punishment of treason, or to the disabilities consequent upon it, must be convicted by a jury of his neighbourhood, upon the previous accusation of a grand jury of his neighbours: also upon a trial before a court appointed by law, for the purpose of seeing that he has every legal advantage the law entitles him to. He is not to be deprived of his liberty, or of his rights essential to its enjoyment, but by the law of the land. And what is the law of the land? Such acts of the Legislature only as violate none of the rules laid down in the constitution—such as allow the citizen the privileges there secured to him—acts inconsistent with the rights of free-

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men as declared in the constitution, which take away ^{May 1796.} their constitutional privileges, which, in short, deprive a man of his life, or of the means of protection by an application to the laws of his country for redress of wrongs, without a previous trial by jury and a conviction by them, are not laws of the land—such are acts not authorized by the constitution—they have no claim to the obedience or support of the citizen as laws—they are void. And if the section in question can be made to bear no other construction than that of taking away a citizen's right to sue, before trial and conviction in a constitutional way, for the offence to which such deprivation is annexed as a punishment, then I humbly contend, that it is void in itself, (342) and of course this plea framed upon it of no validity to hinder the Plaintiff from maintaining his action.

E contra—It was argued that the 101st sec. of 1777, ch. 2, was intended to reach farther than the law of nations would of itself have extended—the disability to sue created by that would have ceased with the war—the Legislature intended that persons who had resided here, and been fostered and protected by the country, and who afterwards in the time of its distress, ungratefully attached themselves to its enemy, should as they separated themselves, remain so, unless in such special instances where, at a future day, the Legislature might be induced to make a special interference. With this view, the disabilities are to continue until the Legislature shall otherwise provide. All subsequent Legislatures have been of the same opinion—none of them have ever passed any act of repeal—this act is yet in force, unless repealed by the treaty of peace: but in truth, the treaty does not repeal but rather confirms it. The fifth article provides, that persons of other descriptions than that of British subjects, or of persons resident in districts in possession of his Majesty's arms, who have not borne arms against the United States; which includes all such persons as have left the country and attached themselves to the enemy, shall have liberty to go to any part of the United States and there to remain twelve months unmolested, in their endeavors to obtain the restitution of such of their estates, rights and properties, as may have been confiscated—this is all that is stipulated in their favor. They are to be received as supplicants for the restitution of their rights—these rights are not to be restored but by the free

May 1796. consent of the Legislature. This part of the treaty admits the validity of the laws depriving them of their rights. It is conformatory of the acts on that head. If they have been subjected to the disability of commencing suits, this treaty stipulates no more for them, than that they shall have an opportunity of interceding for its removal. If persons of the Plaintiff's description are entitled to recover their debts contracted *bona fide* before the end of the war, yet that is not incompatible with the plea. He may be entitled to the debt, and as yet have no remedy for it. It is not new in law to have a right without remedy.—The sovereignty of the country, from motives of policy and public utility, frequently deny a remedy to acknowledged rights, sometimes for a short time only, sometimes forever. In these instances, their right to do so, has never been questioned. They have a right to be guided in the adoption of public measures by a regard to the public happiness, and to deny upon that ground to an individual, what it would seem just to allow him in common with other citizens, merely because it is promotive of the public advantage, to deny him a remedy in a case thus circumstanced. The sovereign power of every country is the proper judge of the cases where such remedies ought to be denied. A debt barred by the act of limitations, is an existing debt, not extinguished by length of time, and capable of acquiring a remedy upon easy terms, yet the law denies a remedy upon motives of policy. An infant may contract a debt, and a creditor be entitled to a remedy against him—here the transaction is not void, the debt exists, and the slightest assent to the contract when of age, revives it. In the case of outlawry, the outlaw for any injury done to his person, is entitled to a satisfaction, but not to any remedy, till his outlawry be removed. Where a treaty is made between two nations against confiscation of debts in the event of war, the citizens of the one nation have a right to their debts against the citizens of the other; but the sovereign power may deny them a remedy, and frequently will deny it even after the war, until the cause be removed. Many other examples might be given. So that if it be taken, that the Plaintiff is one of those persons who is entitled to his debt under the 4th article of the treaty, that is not conclusive to prove him entitled to come into this court for it before a repeal of the 101st section of the court law. The Le-

gislature had the power to continue the suspension of his right even until this time, and in doing so, they may have acted upon very sufficient reasons. May 1796.

Per curiam—It is not stated in the plea, nor clearly admitted at the bar, whether the Plaintiff was ever a citizen of this country, or only resided here, in the time of the formation of the new government. If he only resided here, and never became a citizen, he is to be considered as a British subject; and that perhaps may make his case very different from that of a citizen who attached himself to an enemy, and took up arms against the country.

Counsel for the Plaintiff—He never was a citizen—the counsel on the other side cannot say he was—the plea does not state him to have been a citizen at the time of his departure.

Per curiam—We will take time to consider of the plea, and give judgment sometime before the end of the term. After a few days they gave judgment.

Per curiam—All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs. The 101st section of 1777, c. 2, is certainly repealed as to all British subjects, by the 4th article of the treaty; which is to be regarded as law paramount, the acts of any State Legislature to the contrary, until that treaty shall become suspended by the sovereign authority entrusted with the power to suspend it. Each department of government empowered to do a sovereign act relative to the affairs of the government, must in doing that act, establish what the whole people, and every State, must be bound by as done by competent authority. It is also repealed by 1787, c. 1, declaring this article to be a part of the law of the land. As to British subjects, it is very much to be doubted, whether the mere act of terminating the war by a treaty of peace, did not repeal this clause. That restores them with regard to this country, to the condition of alien friends, and to all the rights belonging to that character, one of which is, the right of commencing a prosecution. It is incompatible with a state of national friendship, and is a cause for war, if the citizens

May 1796. of another country are not allowed to sue for and obtain redress of wrongs in our courts. But however, this may be, British subjects by the 4th article of the treaty, are to be entitled to recover their debts, and this they cannot do without instituting suits. *Quando aliquid conceditur, conceditur ut id, sine qua non pervenitur ad illud.* The Plaintiff is not stated by the plea to have been a citizen; we cannot say he was—but say he was a citizen, the laws may suspend the right of suing for a certain time, or until a certain period, either to all the citizens with respect to certain cases, as was done in 1783; or to a description of citizens coming under particular circumstances, as citizens for instance who had notoriously joined the enemies of the country. It would have been equally impolitic to have suffered them to recover in the time of war, although they could not be arrested so as to be convicted of treason, as to have suffered a British subject to recover. The reason for excluding the latter, applied with equal force to the exclusion of the former. The fact of joining the enemy, upon a plea in disability, might be ascertained by a jury as well as any other fact. This would not be ascertaining a fact for the purpose of punishing the party for his treason, but for the purpose of excluding him for the present from our courts of justice. In the same manner as the fact of being an alien enemy is found, and operates when found. This clause seems to have been made with a view to the war then carrying on, to prevent those inimical to us from getting into their possession, any of the wealth of the country, which might enable them to fight us with more advantage. Considering it in this light, it would seem as if the clause itself should expire with the war, the terminating that being a providing otherwise within the words of the act, and that termination effected by those who were vested with power to do that act of sovereignty that was absolutely binding upon every State, notwithstanding any particular act of the State Legislature to the contrary remaining unrepealed by the State Legislature. But there are sundry acts of the Legislature, which have repealed this clause with respect to the greater number of citizens who had fallen under its operation. By 1783, c. 6, all manner of treasons, misprisions of treason, felony or misdemeanor, committed since the 4th July, 1776, are pardoned and put in total oblivion: but that

act is not to pardon or discharge, or give any benefit to persons who have taken commissions, or have been denominated officers, or acted as such, or to such as have attached themselves to the British and continued without the limits of the State, and returned within twelve months before the passing the act: and nothing in that act is to be so construed as to bar any citizen from his civil action for the recovery of debt or damages. By this act all the citizens of the State are pardoned all treasons and misdemeanors, except those who have borne offices in the enemy's service, or having been in their service as private men, had not returned within 12 months before the passing the act. Now if a disability to sue is inflicted as a punishment for attaching himself to the enemy, then the pardoning of that must of course take away the disability. *Quando subtolitur causa, subtolitur etiam effectus.* Then the 101st section is repealed as to all citizens but those of the two descriptions mentioned in the act. By 1784, c. 20, all persons who attached themselves to the enemy, or aided them in the prosecution of the war, are disabled to hold sundry offices specified in the act; and there is a proviso annexed, that that act shall not be so construed as to permit the return to the State of any person who acted as an officer after being a resident of the State, or who had not submitted to the laws of the State before the ratification of the definitive treaty. The Legislature supposed, and therefore probably intended that the general implication arising from this act would be, that all persons therein described, would be entitled to all the rights of citizens except those denied them in the act, and of course the right to return to this State, unless hindered by an express clause, which they have made as to officers only. If such general implication was intended, and is restrained only as to officers, it follows that all other persons are restored to all the rights of citizenship, except the right of being elected to certain offices; and then the 101st section of 1777, c. 2, is repealed as to all but those who had borne commissions in the enemy's service, and particularly as to one description of persons who were continued subject to it by the act of 1783, namely, those who had attached themselves to the enemy and remained without the limits of the State, and had not returned twelve months before the 18th of April, 1783.—To the same effect with the act of 1784, is the act of 1785, c. 11. Supposing the Plaintiff to have been a citizen

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May 1796. who attached himself to the enemy, without having borne a commission in their service, or having borne a commission to have submitted to the laws of the State before the ratification of the definitive treaty, he is entitled upon the construction of all these acts, now to institute his suit, and this plea does not state, either that he bore a commission, or that he did not submit to the laws of the State before the ratification of the definitive treaty. It is unnecessary to consider how far the section in question is repealed by the termination of the war, independent of any particular acts of the Legislature—for if the Plaintiff was a citizen, then make the worst of the case, and by the acts mentioned, the 101st section is repealed as to him—it not being pretended that he is to be distinguished by either of the disqualifying characters before mentioned. If he was a British subject, then his right to sue for antecedent debts is revived by the 4th article of the treaty, and this is such a debt. Let the plea in abatement be overruled, and the Defendant answer over.

There were several cases depending in this court upon the same pleas, and upon this opinion of the court being given, the pleas were withdrawn and the Defendants pleaded in chief.

(547) At Hillsborough, October, 1796, the three first causes on the argument docket, were standing upon pleas in abatement, and demurrer thereto for the same cause, and the pleas were overruled *per WILLIAMS and HAYWOOD*, without argument, upon the authority of the foregoing decision. Also at Fayetteville, 1796, a client of *Mr. Williams*, who had joined the enemy in the time of the late war, and who had given notice of moving for a writ of error, was suspended by a plea in disability—that plea was now overruled and he was set at liberty to proceed.

Anonymous.

In a bill by a wife for Alimony, it is most proper that the husband be held to bail at first; but if that has not been done, upon proper affidavits by the wife, the husband's property may be sequestered until he gives security for the performance of the decree.

A bill for Alimony was filed by the wife, and no security had been required of the husband. The bill had been served on him, and now an affidavit was made on the part of the wife, setting forth divers circumstances, tending to shew that he was preparing to remove him-

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self and his property ; and it was moved on her behalf, that some person be appointed to take into possession so much of the property as would be sufficient to satisfy the decree the court would probably make, to be released on his giving security to perform the decree. This was urged upon the probability there was, as made out by the affidavit, that should the court only issue process to arrest him and hold him to bail, that he would keep out of the way till he had disposed of his property, and then abscond. And the Plaintiff's counsel said, that this was no new motion, that the same had been done at Halifax, in the case of *Barrow v. Barrow*, some years ago, where the court ordered the property to be sequestered under that part of the act of 1782, *ch. 11*, where it is provided, that during the dependence of the suit, at any time, the court may require further security from a Defendant, or in failure thereof, make use of such personal process as was formerly used by the court of chancery held in this State, and incident to the chancery jurisdiction ; and shall in all cases have power to order such process to enforce their sentences or decrees, as have usually belonged to courts of chancery.

E contra—It was argued, that the act empowers the court to require new security, or to issue a *ne exeat*, but not to interfere with his property, which is not to be touched until after the Plaintiff hath established her claim and obtained a decree. This court cannot issue process to take away a man's property but in cases where a decree is to be satisfied. Should the property of the Defendant be now seized and taken out of his possession, after continuing in the hands of the sequestrators for some time, it may appear upon the hearing of this cause, that she is not entitled to any decree—and will the court upon the mere probability that she may obtain a decree, proceed to seize his property as if she had already obtained it? No man will be safe under such a practice, for in every case of a suit for alimony, the wife may make such an affidavit, and cause the husband to be harassed by a seizure of his property, upon a suggestion of his intending to abscond with his property.

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Per curiam—It would have been much better had he been held to bail at first. The answer denies, but faintly, some of the material charges in the bill. It is possible she may be entitled to a decree. The affidavit shows

May 1796. he is probably devising means to defeat the decree when it shall be given, and that he is about to abscond. Shall we sit still, and see him take his measures to defeat the decree, if any should be given, and not take any steps to prevent it? The court will surely do something to secure the Complainant the benefit of any decree that may hereafter be given in her favor. The common process of a *ne exeat* or *capias* to arrest and hold to bail, it is said, and indeed it is very probable, will not answer the purpose. Should his property be seized under the order moved for, he may be restored to the possession of it again, by giving security to perform the decree. All the difference between this sequestration and that used in the English courts is, that this is more speedy than theirs where there must first be a Sergeant at arms, and a return, &c. a practice not always competent here to effect the purposes of justice, because of our local situation. The practice of this court was decided to be according to the present motion, two or three years ago at Halifax, in the case of *Barrow and Barrow*, by Judge ASHE and Judge WILLIAMS. They knew what the practice was in our court of chancery before the Revolution, and probably grounded that order upon the clause cited from the act of 1782.—We think therefore, that upon the strength of that precedent, the present motion should be allowed. The court then enquired into the amount of the Defendant's fortune, and ordered him to give security for the performance of the decree, in the sum of £1000—and until he did this, that his property to that amount should be sequestered by a person named by them for that purpose, and ordered a writ to issue accordingly.

NOTE.—*Aliter* where there is only a suggestion, that the husband is wasting his property. *Spiller v. Spiller*, post 482.

Smith and others v. Estes.

(349) This cause had been referred to the Master to report upon, and state the amount: he had given notice to *Estes* of the time of taking the report, but had not actually given any notice to *Smith*. A time had been talked of by the Master, which *Smith* said did not suit him, he being then obliged to attend the General Assembly on public business. However, in his absence, the Master proceeded *ex parte*, and made a report. All this was disclo-

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sed to the court by affidavit, in support of a motion for setting aside the report. It was insisted in opposition to the motion, that *Smith* should have made his exceptions to it in due time, and not at this late period, by way of affidavit, taken *ex parte*, and introduced suddenly.

Per curiam—By the practice established here since the creation of Courts of Equity, in the year 1782, when it is referred to the Master to take an account, he, at the instance of either party, must issue a notice appointing a day for attendance. This notice must be served by the party procuring it. If the party cited do not appear on the day appointed, he shall not proceed to take the account in his absence; for perhaps he is sick or prevented by some unavoidable accident, or has not been able to prepare himself to take the account. But then, a second notice appointing another day, shall be issued and served in like manner; and then if the party noticed fail to appear, the account shall be taken *ex parte*. In the present instance, this practice was not observed, and therefore the report must be set aside; and this is the more proper, as the time appointed by the Master, was known to be inconvenient for *Mr. Smith*, and as he had not been actually noticed at all. Where a report is regularly taken, but the items of the account are improperly allowed or disallowed by the Master, exceptions filed to the report are proper; but where the Master proceeds irregularly to take the account, as in the present instance, the objection goes to the whole report, and may be made out and supported by affidavit, as has been done in the present case.

NOTE.—Upon the subject of “reference to master and report,” see *Nash v. Taylor*, 2 *Hay*, 125. *Anonymous*, *Ibid* 157. *Smith v. Estes & Mallet*, *Ibid*, 156. *Smith & others v. Mallet*, *Ibid*, 182. *Thompson v. O’Daniel*, and *Jeffreys v. Farborough*, 2 *Hawks*, 307.

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The following order was made in substance :

Per curiam—It is ordered, that the following hereafter be the rule with respect to depositions. When either party has filed his depositions, he shall apply to the Master for a notice, who shall issue one which shall be served a convenient time before the day appointed by the notice

May 1796. on the opposite party; and on that day the Master shall
 (350) examine the sufficiency of the notices upon which the depositions were taken, and the regularity of taking them; and such objections against the reading the depositions at the hearing as the party can make, shall be considered by the Master, and either allowed and overruled by him, subject however by appeal of either party to be brought before the court at the ensuing term. In case of overruling the objection, and no appeal, the depositions shall be considered to have been properly taken, and shall be read at the hearing, and no objection shall be then allowed. If the objection shall be allowed by the Master, and no appeal, the deposition shall be suppressed and not allowed to be offered at the hearing. If these precautions however are not taken, then the depositions are liable to objection at the hearing, as before the making of this order.

Kenon's Executors v. Williamson, Morris *et al.*

An injunction against a judgment at law, had been dissolved, and upon the coming out of the execution, the Defendants at law exhibited their bill, praying a reconsideration of the sentence of dissolution, and an injunction in the mean time, against the execution.— This injunction was granted by a Judge in vacation, and the bill was filed and an answer was put in. This is not a bill of review, but the court will support it as a petition for a rehearing.

One question in this case was, whether the proceeding upon which an injunction had been issued, was to be considered as a bill of review or not. The Plaintiffs at law had obtained judgment upon the bond of the Defendants, for a large sum of money, conditioned to indemnify them against the creditors of the Company, of which, the testator had been a partner. The Defendants had obtained an injunction against that judgment, and there had been a dissolution of the injunction as to part of the judgment, upon coming in of the answer, and a report made by the Master. In this report it was stated, that two debts, one in Virginia, the other in this State, not yet recovered by the creditors, were debts to which that Company were liable. As to them the injunction was continued. At a following term, the Plaintiffs at law produced the records of recoveries in these two suits, and moved for a further dissolution to the amount of those judgments, being about £1104. Upon the motion, the court took time to advise, and after-

wards dissolved the injunction as to the amount of these judgments. This dissolution took place in the vacation, to be entered as of the preceding term; and afterwards in the same vacation, upon coming out of the execution, the Defendants at law exhibited the bill in question, stating their non-liability to indemnify the Plaintiffs at law against these debts by the terms of the contract—these being debts not contracted by that Company, but by the deceased as partner of a Company under another firm, of which Company, *Williamson* was also a partner—praying a reconsideration of the latter sentence of dissolution, and an injunction in the mean time, against the execution at law. This injunction was granted as prayed for, by a Judge in vacation, and the bill filed and an answer put in. The counsel for the Plaintiffs at law now moved for a dissolution of the latter injunction, and that the bill upon which it was granted might be now taken into consideration and disposed of. As a bill of review, he said, it was certainly improper and without precedent—a bill of review could not be granted without the leave of the court, and when granted, it did not operate as a suspension of the former decree. All parts of the former decree must be performed, except such as if performed would extinguish the right of the Plaintiff in the bill of review; and it is a good plea in bar of the bill of review, that the former decree is not executed. 2 *Eq. Ca. Abr.* 175, sec. 8 & 10. And this point had been so decided upon consideration in a case at Fayetteville, April, 1795. There the wife of *Mr. Spillar* had obtained a decree for alimony; he obtained a bill of review, and moved to suspend any further execution of the decree, until the bill of review could be heard; and the court refused to make any such order, though he strongly insisted, that a bill of review ought to operate like a writ of error, which is a supersedeas to the execution till the writ be determined.—He insisted further, that a bill of review is not allowable in any case, where the original cause is not completely determined, and the decree signed and enrolled—for before that time, the party supposing himself injured by any interlocutory decree, or even after a final decree pronounced, may petition for a rehearing, and have the mistake, if any, rectified that way; and upon a rehearing allowed, the court may order a suspension of proceedings upon the interlocutory order or decree complained of, but

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May 1796. they are not stopped without such special order. This bill is every way improper, and being so, will be dismissed, and the injunction upon it will of course fall with it.

(352) *E contra*—It was argued, that no objection could lie to this bill, as a bill of review, except that of the former cause being not yet decided—as to which, the practice here, had not been precisely settled, and he wished the opinion of the court upon it. It seemed upon principles to be extremely proper, where an interlocutory decree had been hastily or improvidently made, injurious to either party, especially in a case where it was to be attended with a seizure and sale of property, as in the present case, where the execution is to issue immediately for so large a sum, there should be some way of setting it right. He could not see why an injunction to stop proceedings till a re-examination of the mistake complained of, took place, should not be as proper as any other mode. The practice under our present system cannot in all instances be regulated by the same rules as adopted in the courts. There may be a petition of rehearing before the Chancellor at any time. He alone possesses all the power of the Chancery Judge—but here in vacation, each Judge separately does not possess the same power. One Judge cannot make the same order, upon a petition for rehearing, relative to the suspension of proceedings upon a decree or sentence, that the court may; as one Judge cannot make a decree, he cannot suspend it perhaps when made, simply by an order for that purpose: and it may be well doubted, whether one Judge out of court, can grant a rehearing. It is very probable therefore, that the granting an injunction in the present case, was the only measure that could have been adopted in the vacation, to obviate the injury complained of, till the court were again assembled, and could examine into the mistake complained of, and either allow or disallow of the petition for the rehearing, and make the order for the suspension of proceedings on the former sentence. How otherwise can the execution at law be suspended in time of vacation? It is a mistake to say, that bills of review cannot be granted before a complete compliance with the decree. The books will shew many instances where bills of review have been sustained before execution of the decree, and in some instances, without security given for the performance of it. Neither is it in all cases necessary to apply to the court

for leave to file a bill of review. But it is immaterial by ^{May 1796.} what name this instrument may be called—let it have some other name than that of a bill of review—we know the object of it—it is to be relieved against the injustice resulting to the Defendants at law by the last dissolution. In whatever way we can arrive at a reconsideration of the sentence, we shall be satisfied.

Per curiam—A bill of review lies only upon a final decree enrolled. Before it is finally pronounced and recorded, any mistakes may be rectified by a rehearing granted upon a petition for that purpose, stating wherein the injustice is likely to happen. A bill of review is always granted by the permission of the court, given either in one form or another. If it be grounded upon new matter discovered since the hearing, that is exhibited to the court by way of petition for a bill of review; and the allegations of the petition are supported by affidavits—and upon these, the court decides whether it be proper to allow a bill of review. If it be grounded upon error apparent in the proceedings, then the bill is filed without any petition; but the Defendant pleads the decree in bar, and demurs to the opening the enrolment of it—and then the court, before they can dispose of the demurrer, are necessarily obliged to look into the decree, and see whether there is any such error as makes it proper to overrule the demurrer. If there is no such error, they allow the demurrer; if otherwise, they overrule it, and open the enrolment—here is the consent of the court before it can be laid open. When a bill of review is allowed, it does not operate as a supersedeas to the decree, and nothing in the nature of a supersedeas should issue. This was so decided at Fayetteville, as the counsel has mentioned, in April, 1795, upon consideration. The bill of review must be grounded either upon new matter discovered since the hearing, which the party therefore could not use at the time of hearing, and which in the judgment of the court would have caused a different decree from what is made, or for error apparent. In the present case, the objection now urged, might have been urged at the hearing. The objection is, that these debts are not the debts of the Company against which the Defendants at law were bound to indemnify the Plaintiffs at law; and for proof of this, they refer to a comparison of the bonds with the words of the agreement. What was to hinder them from urging

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May 1796.  this matter at the time when the latter dissolution took place? Why did they not long ago, except to that part of the report which states these bonds to be a part of the partnership debts not yet recovered by the creditors?—That report was made up in their presence many terms ago—it was never excepted or objected against, till this bill was filed. This therefore is not any new matter proper for a bill of review, even were the court now to decide upon the propriety of granting a bill of review.—The counsel however, is willing to consider it as a petition for a rehearing, and should it now be disallowed, that the injunction granted upon it shall stand dismissed. It must be in substance a petition for a rehearing, though it differs in form, and upon that ground we will hear it read, and decide upon it. It was then read, and the answer of the Defendants also, by consent; and the court directed the injunction granted upon it to be dissolved—the answer having stated precisely, that these were debts due by the Company, the Defendants at law were bound to indemnify.

Anonymous.

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This was a single bill, for the payment of so many dollars. Plea, *non est factum*, &c.

Per curiam, in their charge to the jury—In an action of debt, two things are recoverable, the numerical sum mentioned in the bond, and damages for the detention of the debt. Where the currency in which judgment is to be given, is equal sum for sum to the money mentioned in the bond, the jury assess damages usually for the detention to the amount of the interest accrued, but they are not obliged to assess damages to the amount only. If upon enquiry, for instance, they find that one pound of the present currency of this country, is not equal to one pound of the money payable by the obligation, whether this inequality be occasioned by depreciation or any other cause, and though the money mentioned in the obligation be not foreign money, they may in the assessment of damages, increase them beyond the amount of the interest, so as to make the damages and principal equal in value to the principal and interest of the money mentioned in the bond. And the jury gave a verdict accordingly, and there was judgment accordingly.

NOTE.—In another case occurring this same term, where the money mentioned in the bond was Spanish milled dollars, secured by a penalty and condition, the court directed the value of the condition to be assessed, and gave judgment for the penalty; leaving the Plaintiff to take out execution for the value assessed, if he thought proper, and the interest. There were several cases also of assumpsits for currency, more depreciated at the time of the contract than it is now; and according to the direction of the court, the Plaintiffs recovered only the real value in the present currency, the sums demanded being reduced one sixth—twelve shillings having been equal to a dollar when the contracts were made, which is now only equal to ten. The practice for the two last circuits has been uniformly upon the same rules, and the cases have not been collected separately, because they are numerous, and the practice is now generally acknowledged and acquiesced in. It was urged in one of these cases, that the jury cannot give a greater value to any coin specified in the act of 1783, c. 4, s. 3, than is there stated; but the court denied that doctrine, and said the jury might assess the value of such coins by the act of 1777, c. 2, s. 24. The reason of fixing a value by 1783, was, for the purpose of ascertaining how many pounds according to the then ideal currency of North-Carolina, were contained in any given contract for coined money; for want of which ascertainment, they were likely to bear different values in different parts of the State, and the creditor be liable to recover less at one place than another, when judgment was to be rendered in pounds shillings and pence in this ideal currency; for there was not actually any currency of North-Carolina at that time, and it had not then changed, nor was it expected to change. A new currency of less value, however, has since appeared, with which for the purposes of justice it becomes frequently necessary to compare those coins, and with the ideal currency before mentioned; and between this last currency and the other two, the act of 1783 has established no rule of exchange. We can readily know by the act of 1783, how many shillings of the old North Carolina currency, a dollar is equal to, but it will not inform us how many shillings of the new currency it represents; and of necessity the jury must ascertain this under the act of 1777. Were this construction not put upon the act, this absurdity would follow, that a contract for so much sterling, would be left to the jury to assess the value of in our currency, upon evidence of the real difference of exchange; whereas if the contract only mentioned so many guineas as were of the value of that sterling, the act of 1783 would decide the value, and allow a much less sum in currency than the sum in sterling money was equal to—and thus two sums precisely equal in value in all other countries, and dischargeable by the same number of guineas, would be dischargeable in this country by different sums of our currency. The like may be said of French, Spanish or any other foreign money, and this could not be the meaning of the act of 1783.

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NOTE.—*Vide Winslow v. Bloom, ante 217.*

Anonymous.

It was said in this case, by *Mr. Moore*, and not denied by any of the bar, that it had been decided in this court a few terms ago, that letters of administration granted in another State, could not entitle the administrator to

May 1796. maintain a suit here. Though he said this question was reserved, and yet depended in Salisbury, in the case of *Hillary Butts's Administrators v. Isaac Price*.

HAYWOOD, Justice.—I was concerned in the case at Salisbury to support the affirmative of the proposition and have taken much pains to inform myself of the law, and I think it is as the court decided here.

NOTE.—It is certain that the English law is agreeable to the decision at Wilmington, as related by *Mr. Moore*. 2 *Alk.* 63. *H. Bl. Re.* 146, 152, 153, 154. *P. Wil.* 370, 371. *Dyer* 303. *Swinb.* 441. 9 *Rep.* 39. *God.* 232, s. 8, 71. *Cro. El.* 472. *Salk.* 40. 1 *Vern.* 397, 307. 1 *Mo. C.* 244. 3 *Term* 387. And the reason given in some of these books is, that if the granting the letters of administration be denied, it cannot be tried, as that is a fact to be tried by a jury. 9 *Rep.* 40. And no jury of the vicinity can be got in the case of an administration alleged to be granted in a foreign country. *God.* 132. By others it seems to be owing to the particular construction of the Ecclesiastical Court, which can only grant administration in such cases where formerly the Bishop might have possessed himself of the goods to be distributed in *pious usus*. 2 *Bl. Com.* 494, 495. That is, of the goods within his own jurisdiction. Before the Bishop, the King had the right of distributing intestate's effects, which power he usually deputed to the Bishop. *Glouv. lib.* 6th, 66, 67. 9 *Rep.* 39. *Plow.* 297. *Swinb.* 428. Until usage at length ripened into a right. 2 *Inst.* 399. 3 *Mo.* 59. *L. Ray.* 86, 363. 5 *Mo.* 247. *Will. Re. pl.* 2. *Salk. pl.* 3. And this right the Bishops abused for their own private advantage, till acts of Parliament compelled them to appoint administrators. So that administration succeeded to the Bishop's right to distribute, and that by the usage only extended to the goods within his own diocese, or of him whose soul he had the care of when alive. These acts substituted the profits arising from the fees for granting letters of administration in the place of the Bishop's ancient right, to distribute the goods. 2 *Alk.* 659.—Where there are no goods therefore, he has no right to grant the letters; and in order to secure to him these substituted profits, where there are goods, the administration is deemed to be void unless granted by him: and since the act for granting administrations, as it would be inconvenient where there are goods in different dioceses, for each Bishop to grant letters, in such case the metropolitan shall grant them; but then their authority extends no further than to the bounds of his jurisdiction. *Swinb.* 440. 2 *Lev.* 86. The probate of wills before the administration act, naturally followed the right to distribute the goods of the intestate; for the Bishop could not ascertain his intestacy, if the will, where there was any, was not to be proven before him. It was therefore adopted as a rule, that he was not to be hindered from distributing, unless where a will was proven in his court, which annihilated his pretensions: and thus the power of taking probate of wills was drawn by the Bishops into their courts, as a thing necessarily incident to their power to distribute in *pious usus*, which they had acquired by usage. A probate before himself, was the only one that could oust the Bishop of his right to distribute: hence a probate beyond sea could not do it, neither would a probate in another court out of the Bishop's jurisdiction; for that court was not sufficiently interested to be careful that the probate should be a fair one, the goods not being within its jurisdiction, nor to be distributed by its

ishop in any event—and such a practice moreover was liable to confusion, as the Bishop might proceed to distribute, not knowing of the probate in another court. Thus it is probable, stood the power of the Bishops at the time when the act for granting administrations was passed, and then the Bishop was appointed to grant the administration, because possessing the power to take probate of wills, he could best know who had died intestate; and it became a rule, that he who had power to take probate of the will of the deceased, might also grant letters of administration in case of his intestacy. As administration followed the probate of wills, and that the power to distribute in ancient times, and as that power was exercised only over the goods within the jurisdiction of each ordinary, it came to be a rule in England at this day, that the granting letters of administration is confined to that jurisdiction within which the goods are; and that all probates of wills and granting letters of administration by other jurisdictions in which the goods are not, are void; although were such probates and administrations allowed to be good, the effects of the deceased would be distributed in the same manner as they would be under the probates and administrations which are allowed to be valid. That a foreign administration is of no force in England therefore, seems to be owing to the peculiar species of jurisdiction given to the Ecclesiastical Courts, that jurisdiction depending upon the local situation of the goods to be administered, so as that there is no authority where there are no effects. This is not a rule founded upon any universal principle; it is a rule of municipal law, founded upon a speciality of circumstances. In this country, the rule of our law is founded upon a different circumstance and other considerations. The jurisdiction here is founded upon the circumstances of the deceased's residence at the time of his death, the probate of his will, or letters of administration is to be granted in the court of the county where he lived, to the end the citizens may know with certainty where to apply, either to prove or to oppose the probate or the granting of letters. The ascertaining intestacies and providing for them, is naturally committed to the same jurisdiction: the granting letters testamentary or of administration by any other court, is void. But letters granted in the county where the deceased did not reside, are void; not for the same reason they would be so in England, where their invalidity is referred to the circumstance of there being no goods of the deceased within the jurisdiction that granted. Since then jurisdiction fails in England, when there are no goods within it, and doth not fail here for the same reason, it may follow that though a foreign administration may not be good in England, it may here; for the goods here may be distributed by administration granted in another jurisdiction than where they are, which in England is not so. In the argument of the case of *Butts and Price* at Salisbury, it was said that the effects within our own territory, are distributable according to the rules of our own law only; and that whoever takes administration, gives security to distribute them according to our law; and if there are no sharers, our law gives the effects of the deceased to the public. The laws of other countries may, and no doubt do in some particulars direct a different mode of distribution; and the administrator appointed under them must administer according to their law. And should a foreign administrator be suffered to recover the effects here, he will convey them into his own country, and distribute them according to the law there, to the injury of the persons entitled by our law, or some of them, and perhaps to the injury of the State. One answer to this is, if the deceased was the subject or citizen of another government, his personal property

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May 1796. here is distributable by the law of his own country, and not by ours. 4 Term 185, 184, 192. *Vatt. b. 2, c. 7, s. 85.* 109, 110. 2 *Ves.* 35. *Amb.* 35. 2 *Stra.* 733. *H. Bl. Rep.* 691. 2 *Bro. Ch.* 37. 2 *P. Wil.* 88. *Loft's Rep.* 15, 16. *Vatt.* 259, s. 85. *P. Ch.* 578. And then there is no reason grounded upon the injustice of the thing that would exclude him. It is not upon that principle he is excluded in England. With respect to the goods of one of our own citizens found here upon his death, the argument seems to have some weight; but neither with respect to him are the reasons of that argument there which exclude him in England—it depends there solely upon the rule that the administration of goods cannot be committed but by the ordinary of the place where the goods are. In addition to the reasons of that argument, another might be urged of some weight, namely, that a foreign administrator might sue here without personally coming into this State, and so avoid the process of creditors; and by that means recover in and convey away his effects without paying his debts: whereas were the administration granted here, he must give security to pay the creditors; which benefit is lost by allowing the foreign administration to be good. And perhaps these reasons are of weight enough to justify the decision at Wilmington—every State should procure justice for its own citizens in the first place, and the requiring letters of administration to be granted here secures it. In the case of our citizen residing in another country, and having effects here at the time of his death, there is better reason for giving validity to a foreign administration; and in case of a foreigner dying here or elsewhere, and leaving effects here, the requiring administration to be taken out here, will not hinder a distribution from being made according to the laws of his country, when at the same time it protects the right of creditors. These considerations indicate the justness of the decisions at Wilmington, and shew that very probably it is good law. They were attended to in the case of *Neal and Mumford*. *Kirby Rep.* 270. Where letters of administration, granted in the State of New-York, were held good to support an action upon in Connecticut, there being no goods and chattels of the deceased in Connecticut—had there been, it was implied in the reasoning on that case, that there should have been an administration in Connecticut, to collect and inventory the effects, and to pay funeral charges and debts contracted in that State.

NOTE.—The decision referred to in this case was confirmed by the Court of Conference, in *Butts's Adm'rs. v. Price*, *Con. Rep.* 68. But an executor can maintain an action here upon letters testamentary issued upon a probate in another State. *Stephens's Ex'rs. v. Smart's Ex'rs.* 1 *Car. Law Rep.* 471. Although an administrator appointed in another State has no right to sue in the courts of this, yet where he has a bond due his intestate, and assigns it, his assignee can maintain an action in our courts in his own name. *Leake v. Gilchrist*, 2 *Dev. Rep.* 73.

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English v. Camp.

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A deposition certified to have been taken on the day and in the county in South Carolina, as specified in the notice, but without stating the particular place, cannot be read.

The counsel for the Defendant offered to read a deposition, and proved the notice, which was that the deposition would be taken at a certain day and place, in a certain county in South Carolina. The deposition was certified to have been taken in the county, and on the day mentioned in the notice, but said nothing of the place where.

Per curiam—The deposition, though certified to have been taken in the proper county, might not have been taken at the place appointed by the notice, and for ought we know to the contrary, the adverse party may have gone to the place appointed on that day. Were we to allow of the reading of this deposition, we should establish a precedent which would put it in the power of a man to deprive his adversary of the benefit of cross-examination whenever he pleased. As to what the counsel urges, that we ought to presume the deposition to have been taken at the proper place, unless the adverse party will show the contrary—how is he to get his witnesses from South Carolina, to prove him to have been present on the day and place appointed by the notice? Or how is he to know, after having been at the place appointed where no deposition was taken, that the deposition had been taken at another place? He may not know of this until the deposition is produced on the trial, and then it is too late to prepare the necessary proof. The deposition was rejected.

NOTE.—*Vide Alston v. Taylor*, post 394, in the note. *Sur. Part's. of McNaughton & Co. v. Lester*, post 421.

Dickey v. Hoodenpile.

In an Ejectment, the first grant is the only thing to be enquired into, without any regard to the entry or survey.

Ejectment for two hundred and forty acres of land.—Dickey claimed under a grant from the State, dated the 10th of September, 1778, and proved the land surveyed

Sep. 1796. at the place mentioned in his declaration. *Hoodenpile* claimed under *McDowell*, who obtained a grant from the State, dated 7th August 1787, which included the same land. *McDowell* had first entered this land—*Dickey* some time after, entered his two hundred and fifty acres on the middle fork of Cain river, but surveyed this tract of two hundred and forty acres on another prong of that river upon *McDowell's* entry—and the question was, whether this grant was valid. It was argued for *Hoodenpile*, that the act of 1777, c. 1, s. 9, declares void all grants otherwise obtained than that act directs; and that the entry-taker had not by his warrant, nor indeed could he authorize the surveyor to survey those lands for *Dickey*, which he had not entered, to the prejudice of *McDowell*, who had entered them; and consequently, that whatever the surveyor had done in surveying these lands, and returning plats of them to the Secretary's office, had been done without authority, and otherwise than the act directs, and so was void, as were also all the proceedings subsequent to that period, the grant inclusive.

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Judge WILLIAMS—When a grant once issues for a tract of vacant land, it becomes the only evidence of title, and we cannot afterwards look further back than the grant. We must admit all antecedent proceedings to have been regular, otherwise we should introduce the practice of invalidating grants by parol testimony. The grant may be suspended and a trial had, where a claimant proceeds to survey and return plats of other land than those he has entered, to the prejudice of another who has entered them: and *McDowell* should have proceeded this way—as he has not done it he has slipped his time, and cannot now object to the grant. It seems unjust that he should lose his land by the mistake of the surveyor, who has surveyed the lands entered by him, for the lands entered at another place by *Dickey*—but *Dickey* by that mistake has lost the land he entered: for it is said, that another person has since obtained a grant for it. It is possible, that *Mr. McDowell* might obtain redress in a Court of Equity, but I am clearly of opinion, he has no remedy in this court. Our Courts of Law have uniformly decided, that whoever obtains the first grant shall be the legal proprietor, without any regard had to the first entry or survey; and indeed without regarding whether there was any entry or not—the court will not go back to these circumstances.

Judge HAYWOOD was silent, having been concerned in Sep. 1796. the cause whilst at the bar. The Plaintiff had a verdict and judgment.

NOTE.—*Vide Reynolds v. Flinn*, and the note thereto ante 106.

Ellmore v. Mills.

A copy of a registered deed certified by the Clerk of the County Court in Virginia, who was certified by the Governor to be the Clerk of that court, is admissible. Acts of the General Assembly of Virginia must be certified by the Secretary and not by the Clerk of the House of Delegates. Notice to take a deposition at the house of *John Archelaus Ellmore*, but the deposition certified to have been taken at the house of *John Ellmore*; held, good, as they will be presumed to be the names of the same person. The statute of limitations begins to run from the time the negroes came in the possession of the Defendant, unless entrusted with them by the Plaintiff for an indefinite time, (for then the act will not begin to run till demand made) or unless the Defendant removed himself so that the Plaintiff could not find him to bring suit, or had the negroes without the knowledge of the Plaintiff.

The Plaintiff offered to produce a registered copy of the deed, which he said disposed of the negroes in question and limited them to the Plaintiff. The copy was certified by the Clerk of a County Court in Virginia, and the Governor had certified that he was the Clerk of that court.

Per curiam—This is well certified, though not in the mode prescribed by the act of Congress—that act is only affirmative, and does not abolish such modes of authentication as were used here before it passed, and this was the usual mode before that act; but the Plaintiff must swear that he has not the original in his possession or power, before he can give the copy in evidence. (360)

In the further progress of the cause, the Plaintiff offered in evidence some acts of the General Assembly of Virginia, copies of which were certified by the Clerk of the House of Delegates, and he was certified by the Governor to be the Clerk of that House, and the proper officer to certify the proceedings of the Legislature.

Per curiam—The Secretary is the officer who has the keeping, and is entrusted to make out copies of the acts of the Legislature. The Clerk of the House of Delegates can only certify such proceedings as take place in the House of Delegates.

In the further progress of this cause, the counsel for the Plaintiff offered to read a deposition. The notice

Sep. 1796. was, that it would be taken in a certain county in the State of South-Carolina, at the house of *John Archelaus Ellmore*: and the deposition was certified to have been taken in that State and county at the house of *John Ellmore*—and it was objected that the deposition was not taken at the place appointed by the notice, and so that the Defendant had lost the benefit of cross-examination.

Per curiam—We will presume *John Archelaus Ellmore* and *John Ellmore*, to be intended for the same person.

Another point in this case was, whether the Plaintiff was barred by the act of limitations. The negroes had been in possession of one *Jordan*, who claimed them as his own, from Christmas, in the year 1785, when he brought them to this State and sold them to *Mills*, against whom no action was commenced till the month of March, 1793.

Per curiam—The act of limitations began to run from the time the negroes came into the possession of the Defendant, unless he was entrusted with them by the Plaintiff for an indefinite time; for then the act will not begin to run till demand made, or unless the Plaintiff can shew that the Defendant removed himself to such places where the Plaintiff could not find him to institute his suit, or had the negroes without the knowledge of the Plaintiff. So Defendant had a verdict, and there was judgment for him.

NOTE.—Upon the sufficiency of the deposition, see *Ridge's Orphans v. Lewis & others*, *Conf. Rep.* 493. Upon the last point, see *Berry's Adm'rs. v. Pullam*, *ante* 16.

Porter v. McClure.

The wife of a person interested in the event of the question, but not of the cause, is admissible as a witness.

(361) The Defendant offered *Mrs Greenwood* to prove that *Hagar*, the wench in question, was a sound and sensible negro. The point in controversy was, whether she was so or not, when *McClure* sold her to *Porter* and warranted her to be so. The husband of this witness had purchased the same negro of *Porter* and since sold her. It was objected that *Mrs. Greenwood* was incompetent, being interested in the event of the question; for if the negro was really an idiot, then the vendee of *Greenwood* may resort to him for selling an unsound negro. She is interested in maintaining the negro to have been a sensible one.

Per curiam—The true rule is, if the verdict in this cause may be given in evidence in another cause for or against the witness, then her testimony should not be received, otherwise it may. Now the verdict in this cause to which *Greenwood* is no party, cannot possibly ever come to be given in evidence for or against him, in any other cause to which he shall be a party, and therefore, she is clearly a competent witness. Formerly there were some doubts, whether a witness interested in the question could be received, and for some time, the decisions were both ways; but it is lately settled in our courts, that no interest but that in the event of the cause, shall render a witness incompetent. She was sworn and gave evidence. Sep. 1796.

NOTE.—*Vide Farrell v. Perry*, and the references in the note, upon this subject, *ante* 2.

Mushrow & Co. v. Graham.

Enoch Sawyer was the subscribing witness to the bond, and he was the Collector of imposts for the district of Camden, and his deposition had been taken, and was now offered to be read.

Per curiam—It is the common practice to receive the depositions of all such public officers, the duties of whose offices oblige them to attend at a particular place for the discharge thereof. Let the deposition be read. He proved the execution of the bond by *Graham*, but did not say that *Graham*, the Defendant in this action, was the person who executed it.

Per curiam—You may identify the Defendant by proof of his hand-writing. The Plaintiff then proved the hand-writing in which the obligor's name was subscribed, to be the hand-writing of *Graham* the Defendant, and he had a verdict and judgment.

England v. Witherspoon.

A tender of a specific article, (as a negro boy,) where no particular place is appointed for delivery, is not sufficient, if only made at the house of the person who is bound to make it.

Tender and refusal pleaded. The note when produced was for one hundred pounds, payable, or to be discharged by delivery of a likely negro, of the age of eleven years, by a day certain. The evidence was, that on that day, an agent of *Witherspoon*, by his direction, attended at his, *Witherspoon's*, house, with a likely negro of the age of 12 or 13. (362)

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Per curiam—It is not a good tender. When a specific article is to be delivered and no place appointed, the debtor must give notice of his readiness to pay on the day, and request the creditor to appoint a place where he will receive it; and on the day he must attend at the place appointed until sunset, to make the delivery, unless the creditor refuses or accepts before; here no such request was made, nor was there any appointment of place; and the creditor could not know that he was ready to make the delivery at his own house; and besides, had that been the place appointed, it does not appear that he attended till sunset, and that the creditor did not come. The jury found against the plea, and the Plaintiff had judgment.

NOTE.—In this case, *Jones*, Solicitor-General, alleged there had been many decisions in the lower courts establishing it as incumbent upon the creditor on the day appointed by the contract, where no place was mentioned, to demand the article at the house of the debtor, otherwise he should not be allowed to support his action—the consequence of which is, that the debtor need not request a place to be appointed, but a being ready at his own house, would be sufficient.—Judge WILLIAMS said, there had been such decisions, founded upon proof that such was the general course of that species of trade that the contract concerned, and that the general practice of the country was such with respect to contracts of that nature; but that the general rule of law was as laid down *ut supra*.

NOTE.—*Mr. Jones* is supported in what he said, by the case of *Armistead v. Abbelsan*, decided at Edenton, 1791. There the Plaintiff declared on a covenant to deliver tar and other articles to a certain amount—the Defendant pleaded always ready, and the Plaintiff was nonsuited for not proving a demand, and refusal or neglect in the Defendant. This decision may have been founded on such evidence as Judge WILLIAMS spoke of. If it was not, it seems, to be directly against the rule laid down in *Co. Litt.* 210, *b.* and which is recognized as the true one in many other books.

NOTE.—*Vide Thompson v. Gaylard*, 2 *Hay.* 150.

Avery v. Moore's Executors.

The action of Trover will lie against Executors for a conversion, in the lifetime of their testator, although the estate may not have been benefited by such conversion.

This was an action of trover, and upon not guilty pleaded, a special verdict had been found, which now came on to be argued. It stated, that *Avery* left the horse in question in the possession of *James McCay*; that two men came with a bill of sale and claimed him; that *McCay* refused to deliver him; that they then applied to *Moore*, who was a Justice of the Peace, to cause the horse to be delivered to them; that he swore them as to the horse

Vide, ante
4, 21, 308.

being their property, and gave a written order for his delivery, which *McCay* disregarded; upon which, *Moore*, in a passion, took hold of the bridle, and delivered the horse to them himself, and they led him away—*Moore* died, and *Avery* instituted this action against his executors. Sep. 1796.
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Judge WILLIAMS—We have decided in many instances that an action of trover will lie against executors, but that was in cases where it appeared the estate of the testator had been benefited by the conversion of the thing that was the subject of contest: as if a man take my horse and sell him, or kill my bullock or my sheep and eat him; here the estate of the testator is benefited, it is saved the expense of the purchase: but the decisions have never gone so far, as to make the action supportable against executors in a case like the present, where the testator disposed of the property without receiving any benefit from it; yet no case has ever negatived the position that trover will lie even in such a case as this.

Judge HAYWOOD—*Trott* and *Hamlin* decides that an action will not lie against executors, where the plea is, not guilty. I am inclined to think that where it is a part of the judgment as formerly rendered, *quod defendens capiatur*, the action will not lie against executors. Judgments formerly concluded, that the Defendant either should be in *misericordia*, or that he should be fined, *et quod capiatur pro fine*; and this was in the nature of a punishment to which executors were never liable: they succeed to the estate and become subject to such actions only as demand a satisfaction from that, not to the offences and punishments due to their testators; and the judgment in the action of trover is not *quod capiatur*. 8 *Re.* 59 *b.* It was in substance only an action of property.—If this position be true, the reason why an action will not lie against executors, will not apply to this case. There have been many decisions in this country, that the action of trover will lie against executors; and the reason they have gone upon is generally stated to be, that the estate of the testator ought to be liable where it has been benefited by the conversion. The example is usually put of killing my bullock and eating him, or taking my bullock and selling him; but I can see no difference in point of justice, between these examples and that of taking my bullock and giving him away so that the owner loses him: the injury to the owner is as great in the latter instance

Sep. 1796. as in the former. At the last Wilmington term, the court had such a case under consideration, and decided against the executors, and against the case of *Hamly* and *Trott*, upon the authority of the cases formerly decided in this country. One great reason of that decision was, to prevent a defect of justice; for where the property is tortiously taken and disposed of, or given away, as here, the action upon the case for an assumpsit will not lie against the executors, trespass will not lie against the executors, and if trover will not, the injured party is without redress, although it is evident some action of property should be maintainable. We will consider further of this case.

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Afterwards at Salisbury, during the sitting of the court there the next term, the Judges WILLIAMS and HAYWOOD certified that this action was maintainable against the executors, and directed the clerk to enter up judgment, and to issue execution thereupon.

NOTE.—*Vide McKinnie's Ex'rs. v. Oliphant's Ex'rs.* and the note thereto, ante 4.

Davison v. Mull.

The plea of "surrender" by bail, must state whether the surrender was made to the court, or to the Sheriff out of court, or it will be bad in form. Under our act of 1777. Rev. c. 115, s. 19, 20, the bail may surrender at any time before final judgment against him. The plea *puis darrein continuance* of the surrender may be refused by the court in cases of hardship, unless the Defendant will submit to the terms of paying costs. An appeal from the County to the Superior Court nullifies the judgment of the County Court.

Plea, and demurrer, which stated that *Mull*, as Sheriff, arrested a man upon a *capias ad respondendum*, and took no bail. *Davison* obtained judgment against the person arrested, and took out a *capias ad satisfaciendum*, which was returned *non est inventus*; he then took out a *sci. fa.* against *Mull*, as bail, in the County Court; and after judgment upon the *sci. fa.* in the County Court, *Mull* appealed to this court; and after the suit had depended here some time, there was a plea *puis darrein continuance* put in by the Defendant, which stated that the Defendant in the original action had been surrendered, with an averment that he had lain in prison twelve months. The demurrer was special, and stated for cause, that the plea did not set forth to whom the surrender was made, whether to the court or to the Sheriff.

Per curiam—It is insisted by the Plaintiff's counsel, Sep. 1796. that our act intended to put bail upon the same footing here as in England by the rules of the common law; and there the condition of the recognizance was forfeited by a *non est inventus* returned to the *capias ad satisfaciendum*; for upon that return it appeared, the Defendant had neither paid the money nor surrendered himself to prison; but by the favour of the court the bail are dischargeable if they surrender before the return of the second *sci. fa.* but that surrender must be made to the court. It is very evident that our Legislature intended to allow to bail greater privileges than were allowed by the common law in the English practice. Our law allows a surrender to the Sheriff; and a surrender at any time before final judgment against the bail, shall discharge them. 1777, c. 2, s. 19, 20, 79. As to the judgment of the County Court which has been rendered, that was not a final judgment, it was suspended, or rather nullified by the appeal—so much so, that there can never afterwards be any proceedings upon such judgment after it is appealed from. Wherefore, as to the general question, whether bail may surrender under such circumstances, we are of opinion for the Defendant. It may indeed operate hardship in the case stated by the counsel, where a Defendant comes in and is surrendered after the Plaintiff has prosecuted the bail through the County Court, at a great expence, into this court: but then it is in the discretion of the court whether they will receive a plea *puis darrein continuance*; and they may receive it upon the terms of the Defendants paying all costs to that time, and the injustice spoken of by that means be avoided. As to the form of the plea—every plea should disclose all such circumstances as the law requires to make up a valid defence against the Plaintiff's action, and the omission of any material circumstance, without which the matter pleaded would not be a good discharge in law, makes the plea invalid. Now the law requires the surrender to be made either in court, or to the Sheriff in the recess of the court; and this is material to be set forth, that the Plaintiff may know how to reply if false; for if it be alleged as a surrender in court, the replication is *nul tiel record*. If out of court, the fact is denied and referred to the decision of a jury. Unless it be set forth to whom the surrender was, it is impossible to know how to reply—there-

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Sep. 1796. fore the plea is bad as to the form in which it is pleaded. The demurrer does not, as is contended, admit the fact of a surrender. A general demurrer admits the fact, and insists it is not sufficient in law for the purpose to which it is adduced: but where a fact if well pleaded might have been sufficient, but it is so pleaded that the other party cannot know how to controvert it: or in other words where the fact is improperly and informally pleaded, and the demurrer specially sets forth the cause thereof, it does not admit the fact, but refers the plea to the court for illegality and informality. However, as the substance of this plea shews a good discharge, it is hard the party should be charged by misleading—we will delay giving judgment for the present, and recommend to the parties an amendment of the pleadings, so that judgment may be given upon the merits. As to the two cases not yet pleaded to in this court, the Defendant may now plead, paying the costs up to this time.

NOTE.—The case of *Peace and Kittrell v. Person & Gordon*, 1 *Murph.* 188, decides that the surrender of the principal by his bail at any time before final judgment against them, will discharge them, and entitle them to the costs of the *sci. fa.* But this is now altered by the act of 1827, c. 15, as to the costs which may accrue in the case where the bail is discharged by the death or surrender of the principal after the term at which the bail is bound to appear and plead to the *sci. fa.* As to effect of an appeal from an Inferior to a Superior Court, see *Murray v. Smith*, 1 *Hawks* 41.

O'Neal v. Owens.

An attachment bond is good without attestation. An attachment must issue, if the Plaintiff makes the proper affidavit, whether it be true or not.

(366) Attachment, and plea in abatement, that the attachment bond was unattested, and no suit could be brought upon it. 2nd, that the Defendant was not about to remove, nor had shewn any symptom of such disposition, but was at home at the time, when the attachment was levied.

Per curiam—Although the Defendant was not about to remove, if the Plaintiff suspected it, so that in conscience he could swear the Defendant was about to do so, he may take the oath; and it is the duty of the Justice of Peace to issue the attachment. If the Defendant sustains damage thereby, he has remedy upon the attachment bond.

or if the oath be false and malicious, he may indict for perjury; but the proceedings shall go on. This has been often decided. As to the bond being unattested, it was decided lately at Fayetteville, that an action of debt will lie on an unattested bond; and as to the condition being only to pay in case of failure, such costs and damages as shall accrue thereon—these are not the words prescribed by the act, but this variance is not pleaded—the only defect alleged by the plea, is non-attestation; but had it pointed out the variance, it would not have been fatal; because, the act allows all forms agreeing in substance with that prescribed in the act, to be valid—then what is the meaning of the words used in the condition, “damages thereon”—surely damages to accrue in or by this attachment, and for such damages relief may be had by a suit on this bond. But it is not necessary to give any opinion upon this point—let the pleas be overruled. A *respondeas ouster* was awarded.

NOTE.—*Vide Ingram v. Hall, ante 193.*

Chambers v. Smith.

Any omission, neglect or delay of the Clerk, or any contrivance of the adverse party, or the improper conduct of the County Court, in granting an appeal where properly applied for, is sufficient to entitle the party to a *certiorari*, and a new trial will be immediately granted in the court above.

Certiorari. *Per curiam*—It is stated in the affidavit of *Chambers*, that after the trial of the issue in this action in the County Court, he moved for an appeal; and afterwards during the sitting of the court, he offered sufficient sureties for prosecuting the appeal with effect, but that the Clerk being not ready with the bond, and telling him it would do as well to give the bond at the next County Court, which happened before the sitting of the Superior Court, he retired; and at the next court he applied again, and was then told by the Clerk it was too late. If this be a true statement he is entitled to a new trial in this court, in the same manner as if the appeal had been regularly brought up. The decisions have been uniform, that after the party prays an appeal, and offers or gives sufficient sureties, and he is defeated of his appeal by the neglect, omission or delay of the Clerk, or by any contrivance of the adverse party, or by any improper conduct of the County Court, as if they adjourn after the tri-

Sep. 1796. al, to prevent the party from applying for the appeal—
 (367) in all such cases, this court will grant a *certiorari*, and order a trial here, without enquiring into the motives of the party praying the appeal, or into the merits of his cause; for by the laws of the country, he is entitled to his appeal whenever he thinks proper to crave it, and he ought not to be defeated of his privilege by the conduct of others: and we would now order the new trial his counsel prays for, but for the contrary affidavits which render it doubtful whether he did offer the sureties as stated in the affidavit. Wherefore let this cause lie over till the first day of next term, that the Plaintiff may produce the affidavits of the sureties themselves who were offered, or such other affidavits as he may think proper.

NOTE.—*Vide Anonymous, ante 302.*

Anonymous.

Certiorari. This cause stood on the docket of causes for trial, and was said by the counsel for the Plaintiff in the *certiorari*, to have been obtained in open court; and he insisted that where a *certiorari* is so obtained, the cause may be set down for trial without any further argument.

Per curiam—Writs of *certiorari* are granted either by a Judge out of court, or upon affidavit and rule to shew cause in court, and sometimes, though irregularly, upon affidavit only in court. In the first instance the cause should be set down on the argument docket, and does not stand for trial until the court have expressly ordered a new trial to be had; and whilst on the argument docket, it may be opposed by counter affidavits. Where granted upon affidavits and rule to show cause in court, it stands for trial without further argument. But when granted upon affidavits only, without a rule to shew cause, it is in the same situation with a *certiorari* granted by a judge out of court. The adverse party must have an opportunity to shew cause against it, and no new trial is to be had, till after he has had a day in court, and fails to appear, or appears to it without effect.

NOTE. *Vide Dawsey v. Davis, ante 280. Reardon v. Guy, 2 Haywood. 245.*

Perkins v. Bullinger.

Sep. 1796.

Where a matter is properly determinable at law and the law can give complete redress, Equity will not interfere. Execution upon a judgment after a year and a day, and after death of the Defendant, without any *scire facias* is irregular; and, if in the County Court may be avoided by writ of error, or if it was in the Superior Court by evidence in ejectment, if land was sold under it.

The bill stated that *Perkins*, in the year 1784, purchased a tract of land of one *Griffham*, and had it regularly conveyed to him and paid the purchase money; and seven or eight years afterwards, *Bullinger* having discovered that one *Michael Delaney* had a judgment against *Griffham*, purchased the same of him; that *Griffham* died, and that *Bullinger*, in the name of *Delaney*, without any *sci. fa.* against the heirs or executors, took out a *fi. fa.* and levied it on the lands purchased by *Perkins*, and caused them to be sold, and purchased them of the Sheriff himself, and had them conveyed to him. And as to this part of the case, the bill prayed that the conveyance might be set aside, and the deed decreed to be given up and cancelled. It then stated the materiality of the testimony of some witnesses, and prayed that that testimony might be perpetuated. There was a demurrer to the first part of this bill, for that, the matters therein set forth is properly determinable at law. (368)

Per curiam—Where a matter is properly determinable at law, and the law can give complete relief, a Court of Equity will not interfere. It is not stated in this bill when *Delaney's* judgment was obtained—suppose it to have been obtained before the sale to *Perkins*, the execution issued after a year and a day, and after the death of *Griffham*, without any *sci. fa.* and therefore the execution is irregular and voidable, and may be avoided if the judgment was in the County Court by writ of error, or if in the Superior Court by taking advantage thereof in an ejectment, either as Plaintiff or by way of defence.—If *Delaney's* judgment was after the sale to *Perkins*, then the land could not be affected by any execution issued upon it, and the Sheriff's sale is void. Indeed it has been decided, that a *fi. fa.* affects lands in this country but from the *teste*, and not from the judgment, and that the judgment only prevents a sale by the owner. According to that decision it may be doubtful whether if this judgment of *Delaney's* had been regularly revived by

Sep. 1796. *sci. fa.* against the heirs and terretenants, whether the lands in the hands of *Perkins* were liable to be affected, as the *fi. fa.* would then issue in consequence of a new judgment. However this may be, it is evident as the present case is stated, that the complainant has remedy at law, and that there is no occasion for him to come into Equity for any relief. Wherefore let the demurrer be allowed: and as to the other part of the bill, which seeks to perpetuate his testimony, as there is no objection made thereto, let the Plaintiff have commissions to take depositions.

NOTE.—Upon the first point see *Glasgow v. Flowers*, and the references in the note, ante 283. In *Hester's Adm'rs. v. Burton*, it was held that an execution which issued upon a judgment after a year and a day was irregular, and it was set aside upon motion. 2 *Hay*. 136.—*Bowen & others v. Lanier*, N. C. Term Rep. 241, decides that errors in law cannot be assigned to process in nature of an execution, for that, if irregular, must be set aside in a different way, as by motion *superseas*, or the like. The case of *Oxley v. Mizle & others*, says that the regularity of an execution cannot be questioned in an action of ejectment against a purchaser under a Sheriff's sale. 3 *Murph.* 250. This case, and also *Weaver v. Cryer and Moore*, 1 *Dev. Rep.* 337, hold that an execution issuing upon a judgment which is more than a year and a day old, is erroneous. It seems that the position in the principal case with regard to the irregularity of the execution is correct, but not so with respect to the mode of taking advantage of the error, nor indeed whether it can be taken advantage of at all against a purchaser under such irregular execution.

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Welch v. Watkins and Pickett.

A note was given by the Plaintiff to *Watkins* for lands, which, it turned out, *Watkins* never had: *Watkins* cannot recover on the note, and as the note (being for the delivery of specific articles) was unnegotiable, *Pickett* is subject to the same objection.

The bill stated that *Watkins* pretended to be possessed of lands on the Cumberland river, of good quality, and enticed the Complainant to purchase 1000 acres, for which the Complainant gave a note to deliver a good wagon and team by such a day, *Watkins* at the same time giving his bond to make a title. Afterwards, *Watkins* was applied to for the title, but did not make it, and in fact was found to possess no land, and confessed he had not any there; but before this, he had endorsed the note to *Pickett*. *Watkins* failed to answer, and the bill was taken *pro confesso* as to him. *Pickett* answered, and insisted he had purchased the note for a valuable consid-

ration. The bill further set forth, that *Pickett*, in the name of *Watkins*, had obtained judgment upon the note for pounds, and had received £180 and had afterwards taken out execution for the full amount of the judgment. Sep. 1796.

Per curiam—The bill states, and it is not denied, that the note was given for lands sold, to which the vendor cannot make a title. He cannot therefore in equity, demand payment of the money, and is not entitled to a recovery of it. In the next place, this note is not negotiable, and therefore, *Pickett* stands in the same place as *Watkins* himself did with respect to the note, and all equitable defences that might have been set up against it.—It is immaterial to *Welch*, whether he gave a valuable consideration for it or not to *Watkins*. Wherefore let the injunction be made perpetual. Had the prayer of this bill extended far enough, we would have made *Pickett* refund the money he has received.

NOTE.—*Vide Jordan v. Black & Hornblow, 2 Mur. 30.*

Martin v. Spier and Montgomery.

A and B, settled accounts, and a balance of £47 was found due to B, and A signed a writing to that effect, which B assigned to a third person, who sued A, and recovered judgment. A, filed a bill for an injunction, setting forth errors in calculation, and stating that by the agreement of the parties, the paper which he had signed was not to be deemed a promissory note. The answer denied all the parts of the bill but the errors. HAYWOOD, Judge, consented with WILLIAMS, Judge, that the injunction should be dissolved as to all but the errors. But HAYWOOD said, that it should be dissolved *in toto*, for the law would have admitted every defence which could be made on the instrument, as that it either was unnegotiable in its nature, or the assignee had notice of the defence previous to the assignment. And if the assignee had not such notice, there could be no defence either at law or Equity, where the instrument was negotiable.

This was an injunction bill, which stated that there had been mutual dealings between *Martin & Spier*, which they adjusted in 1780, at which time there was a balance of £10 and no more, due to *Spier*. That some time afterwards, their dealings still continuing, they came to another settlement, at which time, *Spier* exhibited the articles which composed his former account, and did not make the last balance the first article in the new account, and that *Spier* promised upon this latter settlement, if (870)

Sep. 1796. any errors, omissions or miscalculations should appear on either side, the same should be rectified. The bill then stated several mis-entries in the account of *Spier*, making the sums charged amount to more than they were stated at in former accounts exhibited ; and it also pointed out several errors by miscalculations, and stated several sums of money with which he ought to have been credited—all which errors when rectified, changed the balance of accounts in his favor. The bill further stated that upon the last settlement, there was a balance struck of £47 in favor of *Spier*, and a writing was drawn, purporting that a settlement was made, and that the balance appeared to be £47 and was signed by *Martin* ; but it was not intended as a promissory note, and the parties agreed it should not be so considered. That the mistakes aforesaid were discovered after the signature of the writing, and that *Montgomery*, the other Defendant, had notice of them previous to the assignment of the said writing to him. That afterwards, *Spier* assigned the said writing to *Montgomery*, who sued *Martin* for the money mentioned in the note, and recovered a judgment, &c.—The answer denied all parts of the bill, except the errors in charging the sums of several articles higher than was stated in the account kept before the last settlement ; as to which no answer was given.

Judge WILLIAMS—I am of opinion the injunction should be dissolved as to all except the errors unanswered ; and that the account should be referred to the Master, who should report to next court.

Judge HAYWOOD—I am for dissolving *in toto*, not because I think the answer has denied all parts of the bill, but because the bill itself shews no sufficient cause for coming into this court. After a verdict at law, a man may apply for relief ; but then the case where it is proper for him to do so must be an uncommon one, and must be specially stated so as to shew the cause there is for the interference of this court ; but the rule as to cases in general under which this comes, being not distinguished by any peculiarity of circumstances, is that where the complainant has complete relief at law, Equity will not take any cognizance of his cause. This is the case of the complainant. If, as he states it, the writing assigned to *Montgomery* was not a negotiable one, then it was liable in the hands of *Montgomery*, notwithstanding the

assignment, to every defence and objection that it was in the hands of *Spier*; and at law he might have set up these defences, and have lessened the damages by proving the errors and mistakes stated in the bill; or if the writing was negotiable, and passed into the hands of *Montgomery* with notice of the defence *Martin* intended to make against it, then notwithstanding its negotiability, he might at law have defended himself, by proving the notice *Montgomery* had of the defence intended, previous to his taking an assignment of the note; or if the writing was a negotiable one, and passed to *Montgomery* without notice of the defence intended to be set up, then it was free from any such defence both in Law and Equity, and the bill ought not to be entertained. It is true a Court of Equity has a jurisdiction in cases of account, concurrent with the Courts of Common Law, even where at law the party complainant may have complete redress; yet the complainant must apply to the one or the other of these Courts, and be content with the sentence they pass. He is not at liberty, first to sue or defend in a Court of Law, and after trying his fate there, apply to a Court of Equity. If he could not have completely defended himself without the aid of a Court of Equity, as if he wanted a discovery, he should have filed a bill for a discovery before the verdict had passed against him, and not have waited till after the trial, and then delayed the Plaintiff at law by an application to this court for an injunction. Were this allowable, every Defendant would delay the Plaintiff at law, and send off his cause as long as possible, and afterwards have the benefit of his defence by getting an injunction, and still longer delaying the Plaintiff. I am not for going one step further in granting injunctions against verdicts at law, than are prescribed by the rules of a Court of Equity as laid down in the books. Injunctions are a source of great delay to the Plaintiffs, and of great expence to Defendants, who are generally charged with the heavy expence of a suit in Equity, for no other purpose than that of obtaining a short respite for a few months from execution. I am for dissolving *in toto*, but as the court are divided, I am willing, rather than no dissolution should take place, to dissolve except as to the errors in overcharging the articles mentioned in the bill.

Sep. 1796. It was dissolved accordingly, except as to those articles, and the account referred to the Master to report upon at next term.
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NOTE.—*Vide Black v. Bird*, ante 273, *Welch v. Watkins & Pickel* ante 369, and the references in the note to each case.

Avery v. Brunce.

Per curiam—The rule is where an injunction hath been obtained, and dissolved on hearing the answer of the Defendant, and the Plaintiff retains the bill, if he takes no steps towards preparing his cause for hearing, in two terms after, the bill shall be dismissed for want of prosecution. In the present case, two terms have intervened since the dissolution of the injunction, and the Complainant hath taken no steps by referring the cause, taking depositions or otherwise, and therefore must be dismissed. It was dismissed accordingly.

NOTE. *Vide Anonymous*, ante 162. *Anonymous*, post 451. *Darson v. —* 2 Hay. 296.

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Hughes's Administrators v. Stokes's Administrators.

Where the wife acts as agent or servant of the husband, her admissions against his interest are admissible.

Assumpsit for board and lodging of the intestate. It was proved, that he had boarded with *Hughes* from August 1785, to May 1788; at which time *Hughes* became insane and incapable of managing his affairs. The keeping of the tavern and tavern books was however continued by *Mrs. Hughes* and in her name, and *Stokes* continued to board there till after May, 1788. On the part of the Defendant it was offered in evidence, that *Mrs. Hughes* had acknowledged these accounts to have been discharged or nearly so. It was objected, that the wife shall not be a witness for or against her husband, and that her declarations against her husband's interest cannot be received. To this rule there had been but one exception, and that was in a case, where a wife had hired a nurse for her child, and agreed to pay so much per week—this was al-

lowed to be given in evidence to charge the husband, because it was the proper business of the wife to make such kind of contracts for the husband. *Strange* 527. Sep. 1796.

Per curiam—The wife in the present case, acted as the agent or servant of the husband, and received his monies. The business was carried on by her, and her declarations should be admitted to discharge *Stokes*, upon the same principle it was admitted in the case cited from *Strange*. The evidence was received.

NOTE.—*Vide Emmerson v. Blonden*, 1 *Esp. Reports* 142. *Fenner v. Lewis*, 10 *Johns. Rep.* 38, cited in 2d *Am. Edit.* 2d Vol. *Phil. on Evid.* 221.

Tindall's Executors v. Johnston.

A note payable in tobacco is not negotiable, and being unnegotiable in its creation, it cannot be made so by any *ex post facto* circumstance.

Case. Upon a note assigned to the testator in his lifetime, for one hundred and fifty pounds, to be paid in tobacco inspected at the Cheraws, in South-Carolina, at the market price.

Per curiam—Where the contract is such that it may be discharged in specific articles, it is not negotiable under the act of 1786, c. 4. which makes such bonds negotiable as are for money only. It has been argued, that the bond being for money, to be discharged by the delivery of tobacco at a certain day, and the tobacco being not then delivered, it thereby became a money bond only; the condition annexed, of its being dischargeable in tobacco, being for the benefit of the obligor. This is true, but then at the making of the bond, and until the day of payment, it was not negotiable; and when an instrument is not negotiable at the time of its creation, no *ex post facto* circumstance can make it otherwise—the obligor having not originally contracted to be liable to an assignment and its consequences. The Plaintiff was nonsuited. (375)

NOTE.—*Vide Jamieson v. Farr*, ante 182.

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University of North-Carolina v. Johnston.

HAYWOOD, Judge, was of opinion, that a State grant of lands which had been granted by Lord *Granville*, and which had escheated to the State, was void as not being unappropriated lands, and that this fact might be shown in the action of ejectment. But he reserved the question. A claimant by escheat may enter, and therefore may sustain ejectment. A corporation must make its leases under seal, but the lease which is stated in an ejectment by a corporation is not to be proved, and will be presumed a legal one.

Ejectment. The counsel for the University produced the registered copy of a grant from Lord *Granville*, dated sometime in the year 1763, to one *Mucklehenny*, and proved that he left this country within a year or two after the date of the grant, intending to go to Ireland; and that he has not since been heard of, nor any heir of his. He also produced the act of 1789, c. 21, s. 2, "That all the property that has heretofore, or shall hereafter escheat to the State, shall be, and is hereby vested in the said trustees for the use and benefit of the said University." On the other side was produced, a grant from the State for the same lands, dated in the year 1780. It was argued for the University, that it would probably be objected on the part of the Defendant, that there were no escheat lands in North-Carolina. Escheat being a consequence of feudal tenure, one of the conditions of which was, that when the heritable blood of the tenant failed through want of relations, or by corruption of blood, that the feud should fall back to the lord. It must be admitted that was the correct idea of escheat—yet it is to be observed, that this word having been used by the Legislature so late as the year 1789, where they speak too of lands thereafter to escheat, must have been understood by them to represent some other idea than that of escheat according to its strict technical meaning. They intended the act should have some effect—and one sense in which this word is sometimes used even in the old books, is this, the accidental and unexpected falling of lands to the lord for want of heirs. Another sense is, when those who held of the King (or public) die leaving no heir, and the lands relapse in *fiscum*. *Co. Litt.* 13, a. In this sense it is used in the act, and signifies that the University shall be entitled to all such lands as have been once appropriated, but by some accident have been left without any legal proprietor—no matter by what

means they came into this situation, whether by a dying Sep. 1796.
without heirs, or by becoming an alien to the govern-
ment, as was the case with many upon the adoption of a (374)
new form. If this interpretation be correct, it will lead
us to another question, whether *Mucklehenny* be dead
without heirs, or became an alien upon the declaration of
independence. There is no positive evidence with re-
spect to the first of these points, but the presumptive evi-
dence is strong enough to warrant the jury in drawing
such a conclusion. Where a man is absent a long time
from the country, after going from it with an intention
of returning, as if he go to sea and is not heard of in the
course of six or seven years—it is usual in such cases to
take probate of his will, grant letters of administration
upon his estate, &c. He may be dead, and yet in such
cases it may be utterly impossible to adduce any direct
proof of his death, as suppose the whole crew to be ship-
wrecked and drowned in the ocean. In the present case,
the owner has been absent upwards of thirty years,
and no person claiming to be heir has appeared in all
that time—this also is presumptive evidence sufficiently
strong upon which to infer the fact that there are no heirs.
It is proper here to remark, that he was absent nine years
or thereabout, from this country, before the commence-
ment of the war; and if a space of six or seven years
will raise these presumptions, then prior to the year
1776, when the declaration of independence took place,
he was dead without heirs, and the land had escheated to
Lord *Granville*, all whose proprietary rights came to this
State by the State Constitution. In this view of the case
it is apparent, that the State was entitled to the land in
question immediately upon the formation of the State
Constitution, not as vacant lands, but as lands once ap-
propriated, and of course never since subject to the laws
and regulations respecting unappropriated land; and
though the State may have granted these lands in the
year 1780, to the Defendants, yet that was a grant in
which the State was deceived; or more properly speak-
ing, a grant issued by the officers of government, which
they were not empowered by any law to issue. The offi-
cers are but the servants of the public, appointed for spe-
cial ends, whose acts are only binding when within the
limits prescribed to them by law—the grant is therefore
void. It will be contended that the Defendant has been
in possession ever since the year 1780, a space of more

Sep. 1796. than seven years, and this must be admitted—but does it not follow from thence that the *jus possessionis* which the State had, was barred? *Nullum tempus occurrit populo*, has been a good general rule, without exception till the act of 1791, c. 15. From 1780 then, to the time of grant to the University in 1789, this act had not run; and since 1789, when the title of the University accrued, until the commencement of this action, seven years have not elapsed. So that there is no bar, and as the State grant of 1780, is void, there is nothing to hinder the Plaintiff's recovery.

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It was argued, *e contra*, that the State grant of 1780, was good, and had been so decided in a great number of cases, though granted for lands not strictly vacant within the meaning of the entry laws; for the State having once granted, shall not be permitted in ejectment to say, nor shall any one claiming under the State be permitted to say, the grant issued erroneously, or fraudulently or surreptitiously, and is therefore void.

Judge HAYWOOD (WILLIAMS absent)—I am of opinion for the University as to all the points agitated at the bar, and for the reasons stated in the argument of the Plaintiff's counsel. As to the grant of 1780, there have been many decisions that such grants shall be good until avoided in a Court of Equity. I am of opinion for my own part, that the grant is absolutely void *ab initio*, and that its invalidity may be shown upon a trial in ejectment. It was issued by the Officers of the State, without any authority for so doing; and is no more binding upon the State than if issued by any other person or persons not called Governor and Secretary—but let this point undergo further consideration and a decision that may settle the law—I will not oppose my opinion to that of adjudged cases.

The Jury found for the University, subject to the opinion of the court upon the question, whether the grant of 1780, under the circumstances above stated, was a valid deed or not.

NOTE.—Upon the trial of this cause, it was objected that the action was not maintainable by the University, for two reasons: First, because the Plaintiff in the Ejectment must have the right of possession or right of entry, which is the same thing, and he who claims by escheat has not the *jus intrandi*. The keeping of possession by the Defendant, is a deforcement, 3 *Bl. Com.* 173, and is not to be overturned

by the mere entry of another, but only by the demandant's shewing a better right in a course of law. 3 *Bl. Com.* 179, and in such case he shall have a writ of escheat. 3 *Bl. Com.* 179 2d, the University being a corporation, can make no lease to try the title, but under their corporate seal, by deed duly executed, ; and here, there is no such lease.

HAYWOOD J. (WILLIAMS absent)—The same objections were made a few terms ago at Newbern, in a cause tried there. The objections as I understood, were made by *Mr. Wood*, and the court doubted, and took time till the next term, and then overruled them ; and I concur with them in the propriety of doing so. The lord by escheat, according to circumstances, might sometimes enter, and sometimes was compelled to bring his writ of escheat : he was not always driven to a writ of escheat, as may be seen in 2 *Bl. Com.* 245. When the possession was vacant, he might enter ; but when the deceased had leased for life or otherwise, or conveyed in fee tail, and the reversion only escheated, then he could not enter, for the right of possession was in another, but must bring his writ of escheat. This observation reconciles all the books, and seems to me to be the true doctrine, and then there is no ground for the objection, as this case is circumstanced.—*Vide* 3 *Burr.* 1301, 1303. As to the second objection, the general rule of law is, that every lease by a corporation must be under seal, and must be set forth to be so ; but then when a corporation brings an Ejectment in its corporate capacity, and its lessee sets forth a demise, an ouster, &c. we will presume that lease to have been legally made, and no proof of it is necessary any more than in common cases ; and that presumption extends to its being done by deed under seal, and therefore good—so that that objection fails also. *Vide* 1 *L. Ray.* 136, *Partridge v. Ball.* *Carth.* 390. *Esp. Term Rep.* 199, *Farley, on the demise of the Mayor &c. of Canterbury v. Wood.*

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NOTE.—Upon the point of the grant see *Reynolds v. Flinn*, and the note thereto, *ante* 106. The cases cited to show that it is unnecessary for a corporation to make a deed under the seal of the corporation to try title in the action of ejectment, are supported by the modern practice. *Adams on Ejectment*, 194.

v. Beatty.

If a course and distance be called for in a deed, terminating at a natural boundary, *there* the line must terminate, whether it exceed or fall short of the distance mentioned in the deed. If a course and distance be called for, and there is no natural boundary, nor marked line, the course and distance will prevail ; but if there be a marked line and corner variant from the course and distance, the marked line and corner must be pursued.

This action was brought to ascertain the boundary of the Plaintiff's land. The question depended upon the true termination of the last line but one in the patent, that being the point from which the last line was drawn to the beginning. The last line but one from the maple, south 60, east pole, to a hickory standing on the point of of the island. The last line ran a certain course to the beginning. If the last line but one terminated where it

Sep. 1796. intersects the bank of the island, the course from thence to the beginning was exactly the course of the last line as described in the patent ; but then the distance of the last line but one, would not be completed ; there would be a considerable deficiency ; neither is there any marked hickory at that place. If the last line but one be extended to the completion of the distance mentioned in the patent, it will run considerably into the island, which at the time of the survey for the Plaintiff was appropriated land ; but the distance mentioned in the patent, would not extend to the termination of the marked line found in the island, and the last line drawn from the point where that distance was completed to the beginning, would have intersected the small island in the river which the Plaintiff claimed ; but if from the termination of the marked line, then that island is included within the Plaintiff's boundaries, and the last line in its course would touch the place where the hickory, marked as the corner at the point of the island, was said formerly to stand.

(377) *Per curiam* (HAYWOOD present)—The beginning of the last line is not disputed, the only question is where it terminates, and where was the corner made for it. It is proven to have been made at the point of the island, very considerably out of the course of this line, and nearer to the beginning than any part of this line is. We must in the first place, attend to the rules established by judicial determinations for the settlement of boundary cases, which are, that if a course and distance be called for, terminating at a natural boundary, as a swamp, island, mountain or the like, there the line must terminate, whether it exceed or fall short of the distance expressed in the patent. If a course and distance be called for, and there is no marked line nor natural boundary, that course and distance must be pursued, and the line must terminate where that distance in the course called for, is completed : but if a course and distance be called for, and there be a marked line and corner, variant from that course which is proven to be the line made by the surveyor as a boundary, then that marked line shall be pursued. To examine the present case by these rules—this marked line will intersect the bank of the island before the distance be completed, and a line drawn from thence will exactly agree with the course of the last line mentioned in the

patent, which will not be true, with respect to any line drawn from either of the other two terminations; yet that line disagrees with the description in these particulars—it is not at the point of the island—there is no hickory—and the distance is not completed. If we pursue the marked line into the island, and stop at the completion of the distance mentioned in the patent, that point disagrees with the description in these particulars—it is not at the back of the island, nor at any hickory, nor on the point of the island; neither will the last line drawn from thence be in the course mentioned in the patent.— If we go to the end of the marked line, we enter upon appropriated land, and a line drawn from thence to the beginning will include many acres of this appropriated land; but if vacant land adjoin land appropriated, and the patentee by mistake include part of the appropriated land, he shall hold all the land within his boundaries that was not previously appropriated. Moreover, that point agrees with the description of the patent in more particulars than any of the other points will—the distance of the line leading to that point exceeds the length mentioned in the patent but a little; a line drawn from thence to the beginning will touch the place where the hickory stood; that place will be on the bank of the island, and also at the point of the island. The only circumstance in which it disagrees with the patent is, that a line continued from thence to the beginning, will not be in the course called for. By throwing away the appropriated land in the island, contained within the angle formed by the intersection of the two last lines, or by drawing a line along the edge of the island from its point of intersection by the last line but one, to the point of the island where the hickory stood, we avoid what probably the surveyor intended to avoid, an interference with the appropriated land, and allow to the patentee all, and no more than he was intended to have. Should we run from the beginning of the last line but one, directly to the hickory at the point of the island, we leave the marked line, proven to be marked as a boundary, and leave out a part of the land intended for the patentee. The court therefore is of opinion, that the marked line should be pursued till it strikes the island, and that from thence to the hickory, along the edge of the island, should be deemed another boundary,

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Scp. 1796. and the last line be drawn from thence to the beginning. The jury found accordingly for the Plaintiff.

NOTE.—That the marked line really made as the boundary, is to be followed rather than the course mentioned in the patent, where they happen to disagree, is a rule established by several cases formed upon the case of *Person v. Roundtree*; which is a leading case, and was thus — *Roundtree* entered a tract of land, lying in Granville County, on Shooco creek, and ran the said tract out in following manner: Beginning at a tree on the bank of Shooco creek, running south poles, to a corner, thence east poles, to a corner, thence north poles, to a corner on the creek, thence up the creek to the beginning. By a mistake, either in the Surveyor or in the Secretary who filled up the grant, the courses were reversed: Beginning at the creek at a tree, running north poles, to a corner, thence east, &c, placing the lands on the opposite side of the creek from that on which it was really surveyed, so that the grant did not cover any of the land surveyed. *Roundtree* settled on the land surveyed, which was afterwards entered by *Person*, who obtained a deed from *Earl Granville*, and brought an ejectment against *Roundtree* for the premises. On the trial *Roundtree* proved the lines of the survey, and his having been in possession for some time, claiming the same under his grant. This case, after being several times argued by the counsel on both sides, was at length finally determined by the unanimous opinion of the court, who decided that the mistake of the Surveyor or Secretary, who filled up the grant, should not prejudice the Defendant; and that the Defendant was well entitled to the lands intended to be granted and which had been surveyed. And there was judgment for the Defendant.

NOTE.—*Vide Bradford v. Hill*, and the note thereto, ante 22.

Brown, Messrs. Campbell & Co. v. the Administrators of Craig and Cleary.

When a person receives evidences of debt from his debtor for the purpose of collecting the money, and applying it to the credit of his debtor, he is bound to the same degree of diligence, in attempting to procure payment, and in giving notice of non-payment, though such evidences of debt be not negotiable, as if they were negotiable, and had been endorsed. *Per WILLIAMS*, Judge. But *per HAYWOOD*, Judge. The creditor would not be liable for any loss in such case, unless the debtor could show that the loss happened by his, the creditor's negligence.

(379) Case. For goods, wares and merchandizes sold and delivered. Upon the trial, the Plaintiffs proved their case sufficiently. On the part of the Defendants it was proven, that they delivered to *Brown* some bonds and accounts due to them, the Defendants, from persons resident in South-Carolina, where *Brown* lived; and he gave them a writing, purporting that these debts when collected, should be passed to their credit. Some of the accounts were returned, but one account and some of the

bonds had been sued upon in South-Carolina, and judgments obtained, and *nulla bona* returned to the executions. One of them had been sued upon, and the record proved it to have been proceeded upon for some time, and up to the time when by another record it was proven, that the Defendant had been attainted of a capital offence and hanged; but none of these suits had been instituted till after the expiration of a year from the receipt of the papers by *Brown*. None of these bonds or accounts were endorsed.

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Judge WILLIAMS (after argument by *Duffy* for the Plaintiffs, and *Henderson* for the Defendants)—Where a creditor receives papers that are evidences of debts due to the debtor, to be passed to the credit of the debtor, when the money due upon them shall be received, the creditor is bound to use all the same diligence to procure payment, and in giving notice to his debtor of non-payment, as if the papers received were actually negotiable in their nature, and endorsed. This is proved by the case of *Chamberlyn v. Delarive*, cited at the bar from 2d *Wils.* 353. And as it has been determined in our courts, that a year shall be the longest time allowed for the giving of this notice, in a case decided at Morganton, there is great reason why a person who receives instruments not negotiable, should be bound to give notice in reasonable time, and return the papers; since until the notice given, and the papers returned, the person who passed them has it not in his power to institute suits for the recovery of the monies due upon them; and for want of such notice and return of papers, he may lose his debt entirely.

Judge HAYWOOD—I do not like to give my opinion in this cause, having been concerned in it whilst at the bar; but I cannot agree with Judge WILLIAMS respecting the law of this case. The rules respecting negotiable instruments, are the creatures of commerce. They depend entirely on the custom of merchants, which has applied them for the convenience of commerce to certain commercial instruments only. None but such instruments as are the subject of this custom are liable to these rules. With respect to bills of exchange or the like, the holder of the paper must give notice in reasonable time of non-payment to the indorser; or he must prove on the trial, that the indorser or drawer had suffered no loss for want of

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Sep. 1796. notice ; because when a man takes a negotiable paper by indorsement, the custom raises a contract on his part, to give reasonable notice of non-payment ; but if the paper he takes is not negotiable, the custom being not made to govern such transactions, raises no contract at all concerning it, and there it is regulated by the principles of common justice only. The papers may be returned to the passer of them at any time. The receiving of them by the creditor, is not any discharge of the debtor. *Salk.* 286. But if he has been so negligent after receiving the papers, as that thereby a loss has happened, which by using common and ordinary diligence he might have prevented, and which must fall either upon himself or the passer of the paper, then the passer of the paper by proving that circumstance, shall throw the loss upon the receiver of them—justice requiring that he by whose negligence the loss has happened, shall bear it ; but in this case the Defendants have not proved that the debtors in these papers, were solvent at the time of the reception of them, and for some time after, and are now insolvent ; nor any other circumstance to exempt them from taking back the papers. They have not proven any loss in consequence of any neglect in the holder, without which, or the proof of some equivalent circumstance, I am of opinion they cannot compel *Brown* to take them in payment. (*Vide Salk.* 131. 6 *Mo.* 81.) The jury found for the Plaintiffs, and assessed damages to nine hundred pounds ; and *Henderson*, for the Defendants, moved for a new trial, on account of the misdirection of Judge HAYWOOD, and had a rule to shew cause.

And upon the argument for the new trial he cited 1 *Term Rep.* 405. 714. 4 *Term Rep.* 713, where it is laid down that in case of bills of exchange the payee must give notice of non-acceptance to the drawer in reasonable time, or must prove that no loss could happen to the drawer for want of notice, by proving there were no effects of his in the hands of the drawee. These authorities were cited to overturn that part of the charge to the jury, which stated, that the Defendants were bound to take back the papers, unless he could prove a loss to have happened by the negligence of *Brown*, the holder ; and were intended to establish the reverse of that proposition, namely, that *Brown* must keep the papers as payment, unless he could prove the insolvency of the debtors at the time of

their reception, or before he could possibly recover of them—and the counsel for the Defendants argued, that though the papers in question were not endorsed nor negotiable, yet having been received by *Brown* for the purpose of collecting the monies due upon them, which were when collected to be applied to his own use, and credited to the Defendants, that they were in all respects subject to the same rules of law as if they actually were bills of exchange and negotiable by endorsement. And of this opinion was Judge WILLIAMS clearly; and he was for granting a new trial. Judge HAYWOOD continued to be still of his former opinion, but declined opposing the new trial, having been formerly concerned as counsel for the Plaintiffs. A new trial was granted accordingly; and at the next term, in March, 1797, the Plaintiff's witness being not in court when the cause was called, he suffered a nonsuit.

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NOTE.—*Vide* the next case of *Alston v. Taylor*.



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Alston v. Taylor.

WILLIAMS, Judge, inclined to change the opinion expressed in the preceding case of *Brown, Campbell & Co. v. Admr's of Craig and Cleary*, and to hold that unnegotiable paper, though endorsed, does not bind to the same diligence as negotiable instruments. Bonds made in Virginia and assignable by the laws of that State, but not assignable by our laws, must be subject to our laws when the contract of assignment is made in this State. A deposition expressed to have been taken at the house of *Manning*, at Halifax (Va.) court-house, when the notice was to take it at Halifax court house, was rejected, although it was proved that *Manning's* house stood only about eighty yards from the court-house. The receipt of an Attorney now deceased, is admissible to prove the time when bonds were put into his hands for collection. A record of a court, certified properly, except a want of the seal of the court, is not admissible, unless it be certified that the court had no seal.

The declaration stated a count for money had and received to the use of the Plaintiff; another for money laid out and expended for the use of the Defendant; another for goods, wares and merchandize sold and delivered; and another special count as follows, *to wit*: And whereas also, the said *Edmund (Taylor)* was indebted to one *John Henderson*, in the sum of sixteen hundred and fifty

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pounds, the said *Edmund*, the day and year aforesaid, in the county and district aforesaid, did undertake and promise the said *Lemuel (Alston)* that if the said *Lemuel* would pay and satisfy the said *John*, the sum of money last aforesaid, so that he the said *Edmund* should be exonerated and discharged of and from the same debts, by him so owing to the said *John*, that he the said *Edmund*, in consideration thereof, would well and truly repay him the said *Lemuel*, the sums of money so by him to be paid to the said *John*, and would for that purpose, empower and authorise him the said *Lemuel*, to ask, demand and sue for at law, in the name of him the said *Edmund*, sundry debts due and owing to him *Edmund*, by one *John Lewis, jun.* at the costs of him *Edmund*; and the money when obtained by him *Lemuel*, to be applied towards the repayment and satisfaction of him *Lemuel*—and the said *Lemuel* avers, that he hath paid the said *Henderson* the sum of sixteen hundred pounds, for and on account of said *Edmund*, and hath procured him *Edmund* to be discharged and exonerated from the same, and hath in fact, used due diligence, to recover the monies due and owing by the said *John Lewis, jun.* to the said *Edmund*; and hath for that purpose brought suits at law, and hath expended in the necessary support thereof, and for his necessary expences in attending thereon, and in endeavoring to procure payment as aforesaid, from said *Lewis*, the sum of two hundred pounds; but hath not been able to obtain any payment or satisfaction from said *Lewis*: all of which the said *Edmund* afterwards, *to wit*, on the twentieth day of October, in the year 1792, at Granville county aforesaid, had notice: and was then and there, *to wit*, the day and place last aforesaid, requested by the said *Lemuel*, to pay and satisfy him the money paid to said *Henderson* by him *Lemuel*, at the request of him *Edmund* as aforesaid, and for the costs and expences aforesaid of him *Lemuel*, laid out and expended as aforesaid, in endeavoring to recover and collect the debts due to said *Edmund*, by *John Lewis* as aforesaid. Nevertheless, &c.—To this declaration the Defendant pleaded *non assumpsit*, and the cause now came on to be tried.

The Plaintiff produced three several bonds, payable in December, 1779. 1780. 1781, by *Lewis* to *Taylor*; each of them endorsed with an assignment from *Taylor* to *Alston*, the Plaintiff, on the 10th of December, 1782; and

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he proved on his part, that he agreed to take them, upon condition that if he could not get the money of *Lewis*, he should have recourse to *Taylor*; upon which *Taylor* assigned them. He proved also, that within two months or less, from the date of the assignment, he applied to *Lewis*, and procured some negroes in part discharge of the debts; and that on the 8th of January, 1784, he put the bonds into the hands of an Attorney in Virginia, to bring suits upon; which were brought accordingly the 27th of April, 1785. That on the 10th of December, 1784, he received seventeen thousand weight of tobacco as a further payment, and that in April, 1791 (the Defendant in the mean time having died) the suits were called and dismissed. That on the 19th of July, 1790, he caused writs to be issued against the executors; and at July term, 1791, in Caswell County Court, he obtained judgment. That previous to this, the executors removed to South-Carolina, and that on the 26th of April, 1791, he sued them upon these judgments in South-Carolina.—That in October, 1792, the judgments were reversed in this court for error in the proceedings; and that in November following, the jury were impaneled upon his suits in South-Carolina, and found against him: and that on the 13th of October, 1792, he gave notice of these proceedings to *Taylor*, and that he intended to resort to him. On the part of the Defendant it was proven, that when the contract was made, it was insisted on by *Alston*, that the bonds should be assigned by *Taylor*, to the end that if he failed to get the money of *Lewis*, he might then resort to *Taylor*; and that *Taylor* upon this made the assignment, saying the circumstances of *Lewis* are good, and if he does not pay you, come to me, and I will go with you and see you paid. That not long afterwards, within two months, *Alston* bought some negroes from *Lewis*, and said he could have had more, but the price was rather too high—he thought it most proper to wait till some future time, when he might have it in his power to make a better bargain; and said to *Taylor*, you are clear, he has property enough. It was further proven, that the bonds endorsed were made in Virginia, and there payable.

Whyte for the Defendant—This is a new case. I have never in the course of my practice or reading met with one so circumstanced in all respects. The bonds in question were given in Virginia, where they were assignable

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by the act of 22d *Geo. II.* c. 33, s. 7, passed in the year 1748. The difficulty arises from the assignment having taken place in this State—had it been in Virginia, I think there could have been no question, but that the same contract would have been implied from the assignment, as is implied by law from the assignment of all negotiable papers, namely, that the assignee should apply in a reasonable time for payment, and if he could not procure payment, that he should in a reasonable time give notice thereof to the indorser, and also that he intended to resort to him. These parties intended to vest an interest in the assignee by the indorsement. It was required for the very purpose of enabling the assignee to commence suits in his own name, and to make the indorser liable upon the event of the indorsee not being able to procure payment of the obligor. This evidently was the expressed intent of the parties, and I can see no rule of law to hinder that intent from taking effect. These bonds were in their original creation negotiable, and it cannot be insisted they lost this quality by being brought into this State. A contract of any kind made in one country, is in all other countries to be considered in the same light, and to have all the same qualities it had in the country where made. Thus a debt in Virginia or the Indies, if sued upon in our courts, will draw the same rate of interest as it would have done in the courts of those countries. A debt contracted in France, which would have been void by the English law if contracted in England, shall be carried into effect in the English courts. 1 *Bl. Rep.* 258. There can be no good reason for saying, that an instrument negotiable where made, should lose that quality by passing into another country. When once uttered, the laws of the country where made, are a pledge to all nations that the assignee may recover. When the obligor contracts to bind himself by such an instrument, he agrees with all mankind that he will pay it to the assignee. He agrees by the very nature of the instrument he makes, that it shall not be considered as a mere *chose* in action. Where then will be the injustice to the obligor in saying, in *hæc vincula venisti*, when you made the instrument—you shall be bound by your undertaking to pay the assignee, as implied by law from the obligation you have entered into. Shall he not be compelled to pay the assignee when he has engaged to do it, without which

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engagement perhaps, evidenced by such an instrument, the obligee would not have contracted with him at all? When we see a negotiable instrument made, it is surely some evidence that the creditor was intended to have greater privileges with respect to the transfer of the debt, than if it was an instrument not possessing a transferable quality by law. Is there any reason that the laws of this State should give fewer privileges upon these foreign contracts, than the laws of the country where they were made? Shall we say that our own citizen who has taken an assignment, shall not sue in his own name, shall not be the proprietor in all respects by virtue of the assignment, when by going into the country where the contract was made, he will be entitled to that advantage, and will be so considered? Our courts are open for the enforcing of all legal contracts wherever made, according to their true meaning and intent; but according to the position I am now controverting, a man by removing himself from Virginia into this State, defeats that assignee who has taken his assignment here, of his remedy and interest entirely: or indeed, even if the assignment be taken in Virginia, for there is as much propriety in saying an assignment in Virginia shall not vest the property, as that an assignment here shall not do it. It is true bonds made here before the act of 1786, were not assignable, because the assignment of *choses in action* tend to encourage litigation. When therefore a man entered into such an obligation, it was no part of the contract, but indeed the reverse, that he should be liable to be sued by an assignee. Such a bond therefore cannot be assigned in any part of the world; but the exact opposite of this is the case with all bonds made in Virginia, since the year 1748: and I presume, the laws of no country will say, that the contract of the obligor shall be divested in his favor of any of its original stipulations, which were for the benefit of the obligee; one of which is with respect to Virginia bonds, that he will be liable to an assignee. As well might we say, that a promissory note or inland bill of exchange drawn in England, and assigned here to one of our citizens, shall not be recoverable here against the drawer or maker, as there is no law here to render them negotiable—and as well might the English courts say, you shall not recover before us because the contract of assignment was made in a country where these

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Oct. 1796. notes are not negotiable. Were it the general law, the circulating paper of each country would immediately be confined within the limits of its own territory. We could take nothing but money from them—we could make no use of the paper they circulate, nor they of that we circulate. The commercial credit of all would sustain a contraction, and become palsied. To avoid these mischiefs, it is a principle of the common law long ago established, that every assignment follows the nature of the contract assigned: that is to say, if the original contract is made unrestrictively assignable, the assignment itself will convey to the holder an unrestricted power of assigning the instrument, and the same interest, property and power that the first holder had. 2 Burr. 1225. I think therefore, it may well be assumed, that these bonds were originally negotiable; they continued to be so when bro't into this State; and that the assignment of them here, vested the whole interest in the assignee, and rendered the endorser a surety for the payment upon the observance of those terms and conditions on the part of the assignee, which are implied *ipso facto* in the case of negotiable instruments from the assignment itself. Upon this foundation I shall proceed to inquire, whether there are not such circumstances in this case, as will discharge the endorser from this action. Wherever a note, and by parity of reason a bond, is assigned, its resemblance to a bill of exchange commences, and not before; and from that moment it takes upon itself all the properties of a bill of exchange. The assignor of the note or bond, is the drawer; the assignee, the payee; and the obligor, the acceptor. *Kidd on Bills*, 34, 35. The engagement of the endorser and endorsee are then exactly similar to the engagements of the drawer and payee of a bill of exchange. The engagement of the drawer in the one case, and of the endorser in the other, is only conditional; namely, that if the paper be presented in a reasonable time, and payment not obtained from the drawer, maker or obligor, and notice thereof, be given in reasonable time, that then he will pay the debt himself. *Kidd* 117. The payee or endorsee is therefore bound, first to present the bill, or note or bond, in reasonable time; and secondly, if payment be refused or delayed, he must give notice in reasonable time to the drawer or endorser, of that circumstance. If he fails in the performance of either of these requisites, the

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drawer in the one case, and the endorser in the other, is discharged. 3 *Bac. Ab.* 613, 614. This notice must be given to all the preceding parties to whom he means to resort. *Kidd* 118, 119. It must not be simply, that payment has been refused or delayed, but moreover, that he does not intend to give credit to the drawee of the bill, or the maker of the note or bond, but that he means to resort to the endorser for payment. The purpose of the notice being to signify to the drawer of the bill, or endorser of the note, that the endorsee or payee looks to him for payment. *Kidd* 125, 126. 1 *D. & E.* 169. 1 *Salk.* 127. These authorities all show, that the endorsee of a note, must give notice in reasonable time to the endorser of the note, of non-payment by the maker, and that he intends to resort to him the endorser. Now, has this been done in the present case? These bonds were endorsed on the 10th December, 1782, and *Alston*, the Plaintiff, gave no notice till the 13th of October, 1792—a space of nearly ten years. In all this time, it does not appear *Taylor* knew of the non-payment by *Lewis*. Surely this cannot be said to be a giving of notice in reasonable time. Had notice been given in any reasonable time after the assignment, and even at any time before the death of *Lewis*, which happened in the year 1790, in all probability, *Taylor* would have procured payment, as there is no doubt but that *Lewis* was during all the intervening time in very solvent circumstances. He is now dead—his estate divided among his legatees, and his executors removed to South-Carolina. After the lapse of so many years, during which this alteration of circumstances to the prejudice of the creditor has happened, is it reasonable, that *Taylor*, the endorser, should now be compelled to submit to all the unfavorable circumstances that he might so easily have avoided, had it not been for the negligence of the endorsee? Both law and reason pronounce that such inconveniences being consequences of the Plaintiff's neglect, shall fall upon him alone. He even did not bring suit upon the bonds till thirteen months had expired after the assignment. Surely, he might have given notice to the endorser in less time than this. He lived as appears in evidence, in the neighborhood of the endorser, and not more than 50 or 60 miles from *Lewis* the obligor. But it is immaterial to dwell upon this circumstance, as the bringing of suit was no excuse for not gi-

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Upon this part of the case, therefore, I trust, it is not rash to conclude, that the Plaintiff must fail—he has given no such notice of non-payment, as the law, and the nature of his contract, required; and by his failure in that particular, has made the bonds his own, and discharged the indorser from his warranty. He has not only failed to give notice, but soon after the assignment, having seen *Lewis* and conversed with him, and inquired into his circumstances, and received a partial payment of the bonds, he informed *Taylor*, the indorser, that he considered him as clear from his suretyship or warranty of the bond; thereby putting him into a state of security and inattention to the business for the future. Instead of this, had he then informed the indorser, that he could procure payment but for part, and looked to him for the balance, there is no doubt but the indorser would have taken measures to procure payment, and all the inconveniences & difficulties which have since arisen, would have been prevented. How hard and unjust then would it be, after so much negligence, and such a declaration on the part of *Alston*, now to make the indorser liable? But independent of the want of notice, and this declaration by the indorsee, there is another circumstance in this case which will indubitably discharge the indorser—the indorsee received part of the money from *Lewis*, five or six negroes, within two months after the assignment, and seventeen thousand weight of tobacco, on the tenth of December, 1784; and the rule is, that if the indorsee gives credit to the maker of the note, he thereby discharges the indorser; and the receipt of any part is a giving of credit to the maker or obligor, unless he give notice for the balance of its non-payment. 1 *Show.* 102. 1 *L. Ray.* 744. 2 *Stra.* 745. 1 *Wils.* 48. *Kidd on Bills* 65. *Bull. Nisi. Pri.* 271. In the present case, he indorsee received part, and delayed receiving the residue with the prospect of

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getting an advantageous bargain of *Lewis* afterwards ; and so far was he from intimating to *Taylor* any intention to resort to him for the balance, that he expressly discharges him, upon this point also he must fail. The Plaintiff however insists, that however the assignment might be construed so as to affect him, yet that is not the contract he is going upon, he is going upon a special contract set forth in the declaration, by which he is to have recourse to *Taylor* whenever it shall appear he is not able to get the money of *Lewis*. His counsel well know it would not do to rely upon the assignment, and admit the bonds to be negotiable, and therefore they devised this special count, in which they chuse to consider them as unnegotiable, and as having been passed to *Alston* under a special parol contract. They abandon the assignment, or use it as made for a special purpose subservient to the parol contract. I apprehend the court and jury will take no notice of any parol agreement, when there is an agreement evidenced *in scriptis*, as there is in this case by the indorsement, which implies a very different contract from that attempted to be proven at the bar. The written assignment binds the holder to certain conditions, under pain of losing his recourse to the indorser ; the parol agreement as attempted to be proven, releases from the observance of any condition on his part, and gives him an absolute recourse at any distance of time in case of non-payment. Supposing the bonds to have been negotiable, the admitting of a parol contract to overturn or to alter the legal import of the indorsement, can never be tolerated ; no one would take a paper passing through many hands, in each of which the instrument might have been clogged with some secret parol contract. It would be liable to endless litigation. Such an admission, it is easy to perceive, strikes at the very existence of all negotiable papers. Supposing the bonds to be unnegotiable, the parol testimony cannot be received to control the written agreement, because there is more certainty in relying upon that which is preserved unaltered in writing, than in the wavering memory of any living witness—it cannot be regarded. 2 *Bac. Ab.* (389) 309. 8 *Rep* 309. *Gillb.* 5 & 6. In either case we must apply ourselves solely to the consideration & consequences of the assignment indorsed, and draw our conclusions from that only. What these consequences are, I have already considered, and they have turned out in favor of the indorser.

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It is plain the Plaintiff cannot recover on any of the general counts—there is evidence of money paid to the use of *Taylor*, but there is also evidence which shews in the events which have taken place, that these bonds were received in payment for the money. They are in law made to be the bonds of the holder by the circumstances that have happened. They are absolute discharges of the indorser. When an indorsed paper is kept an unreasonable time in the hands of the indorsee, the law deems it a payment of a preceding debt by him who made the indorsement. He cannot recover on the special count, admitting the parol evidence may be received, for that must be proven precisely as laid. The evidence is, that these bonds were assigned for the purpose of enabling the assignee to sue in his own name, and to recover the money to his own use. This is the evidence both by the parol and written testimony. The declaration is, that he was to sue in the name of *Edmund*, and the money to be recovered to the use of *Edmund*, and to go as a satisfaction of his debt to *Alston*. The variance is palpable and material. The evidence cannot be taken to support the special count, and it must be deserted. But let it be granted as is contended for on the other side, that these bonds were not negotiable; still the indorsement of them to *Alston*, bound him to use the same diligence to procure payment, and to give notice of non-payment in a reasonable time, as if they had been actually negotiable. For the proof of this position, I cite, 2 *Wils.* 353, which fully comes up to it. There the Plaintiff, being a creditor of the Defendant, received from him a draft not negotiable, and kept it by him without presenting it for payment four months; in which time the person upon whom it was drawn, became insolvent. Though it was admitted an unnegotiable paper, yet his negligence was deemed upon argument to have made it a payment and discharge of the debt due from the drawer. Upon each, or some of these points, I trust there will be judgment for the Defendant.

(390) *Davie* for the Plaintiff.—This case is not at all connected with the rules relative to bills of exchange—these are the offspring of commerce, in which it is of the highest importance that all possible punctuality be observed. In a country as commercial as England, no delays can be admitted without great danger to the party who passes a negotiable paper. The drawee may either be a

merchant himself, liable to fail upon the loss of a ship the failure of a foreign correspondent, and from a thousand other causes, to which as he is hourly subject, it may be every hour expected—or if the drawee be not a merchant, he may be a manufacturer, or in other situations dependent for the money with which he intends to pay, on a merchant, subject to all these casualties. Many merchants in splendid circumstances, by the failure of a foreign house utterly unknown to their home dealers and correspondents, suddenly, in the course of a day, have become bankrupts, and passed away like shadows. It is very proper therefore in that country, that the receiver or holder of a negotiable paper, should be bound to apply for payment without delay. Were that not a condition imposed by law, no one would be safe in passing a bill to another—he never could know, though every minute in danger, when his liability ceased, nor when he was certainly discharged from the recourse of the holder.—This would greatly check, if not destroy, the currency of a paper medium, promotive as it is of commercial designs. But with respect even to negotiable paper in this country, there is no necessity for such despatch; the generality of the people here, are substantial, independent farmers, whose property and circumstances are not subject to the contingencies that are likely to befall manufacturers and others in England. It would be useless to adopt here, all the rules for accelerating application for payment, and notice to the endorser, that have been found necessary there. It is argued, that if this assignment cannot have the qualities contended for by the Defendant, it was of no use, and nugatory in *Alston* to require it.—Though it vested no property in *Alston*, yet it is attended with effects very important to him. The endorsement of a bond not negotiable, passes the equitable interest to the assignee—he may maintain a suit in the name of the obligee, which the obligee will not be permitted to dismiss at pleasure. Should he attempt a dismission, a Court of Equity will enjoin him—when the money is recovered, he may by virtue of the assignment apply it to his own use. The assignment will cause it to be no maintenance in him to prosecute the suit in the name of the obligee—and the Sheriff when he levies the money by virtue of the execution issued on the judgment, may pay it to the assignee, by force of the assignment, and he will be justified.—The assignment operates as a complete power given to

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the assignee to receive the money—such an assignment has these effects from the contract implied by the assignment, and from natural equity ; but it partakes not of any of the qualities of an endorsement of a negotiable paper. These are derived, not from any principle of natural equity, but from rules found necessary from experience to be established for the purposes of commerce—strict artificial rules prescribed by the custom of merchants, to obviate the inconveniences which would result from transacting commercial affairs by means of a paper credit, were they not established. They depend upon this custom, are ascertained by it, and are applicable to no contracts but such as are the subjects of that custom. The bonds that gave rise to the present controversy, are indeed assignable by the law of Virginia : but that law adds to them in their assigned state, even when assigned in Virginia, no other circumstance attendant on bills exchange, but this, that the assignee may sue in his own name. That law does not say they shall be assignable in like manner as bills of exchange, or as promissory notes, or as the act of 3 & 4 *Anne*, c. 9, or our act of 1786, c. 4, did. From this omission in the act of Virginia, it is evident the Legislature intended no more than to vest the property of the bonds in the assignee, for the purpose of enabling him to sue in his own name, and by that means to exclude the obligee from any interference with the suit after its commencement. It was not made with a view of benefiting the commercial part of the community, but simply to prevent the injustice of assignors ; who as the law stood at the time of making the act, were deemed to be the real Plaintiffs, and to have at law a power over the suit—and by attempting to dismiss the suit, or to receive the money, or by contracting a debt after the assignment, might either defeat the action of the assignee, or compel him to resort to a Court of Equity for relief. All this was prevented by saying, the assignment should vest a right of action in the assignee in his own name—thus far the act intended to go, and no further : and it manifests its design still more clearly, by providing that the Plaintiff, the assignee, in any suit brought by him, shall allow all discounts that the Defendant can prove, either against the Plaintiff himself, or against the first obligee, before notice of the assignment given to the Defendant—a circumstance evidently separating the case

of these assignments, from those of papers negotiable by the custom of merchants. For by the rules of that custom, the instrument in the hands of the assignee, is exempted from the operation of all payments and agreements whatever, except those apparent upon the instrument itself. This provision alone fully proves, that these bonds when assigned, were not intended to have any participation of the nature of bills of exchange, save only that which I have before mentioned. They are not entitled to be otherwise respected in the light of bills of exchange, nor as possessing any of their characteristic properties, but only that of vesting by assignment in the assignee. In all events these bonds were not assignable by any law of this country, and if contracts are to be expounded by the laws of the country where made, as stated in 1 *Bl. Rep.* 258, as cited on the other side, the contract of assignment being made here, can only have the effect which the laws of this country will give it—a power to sue in the name of the obligee, as set forth in the special count in this declaration. The contract being made here, must be construed by the laws of this country, in the same manner as the acceptance of a bill in one country, that was drawn in another, shall be subject as to the acceptance, to the laws of the country where that acceptance was made. 2 *Strange* 733. And as English or Indian interest is to be allowed in contracts made in those countries, and in the same manner as an English court will carry into effect a contract made in France, though void by the law of England had it been made there. This one general principle governs the whole of these cases, that the law of the country where the contract was made, shall decide its legal consequences, its legal import and extent; and according to this principle, Virginia bonds when assigned in this country, have always been sued upon in the name of the obligee. This was one of the reasons the court went upon in reversing the judgments given in the actions in the County Court of Caswell. The action was there instituted in the name of the assignee, then permitted by the court after issue joined, to be altered, so as to appear to have been instituted in the name of the obligee. I do not deny but that the assignment of a bill or note, implies the obligation on the part of the assignee contended for by the Defendant's counsel, but I say these bonds were not negotiable, and

Oct. 1796 that therefore the assignment of them will not impose any such terms as the assignment of a bill or note would.—
 (393) It operates as a mere power to institute suits in the name of the obligee ; and is evidence against him of money had and received from the assignee, which evidence supports one of the general counts in this declaration. Then upon what ground stands the defence? *Mr. Taylor* has received our money ; the consideration for which was, that these bonds should be taken by the Plaintiff, and should enable him to receive the money of *Lewis*. He has not been able to receive it—the consideration has failed ; and wherever it does fail, the money advanced with a view to it, shall be refunded, and may be recovered back in an action upon an *indebitatus assumpsit*. If a bill be given for an hundred pounds, and the holder cannot get it paid, he may demand the hundred pounds as a debt. 1 *Com.* 134. 3 *Lev.* 364. *Bull. Nisi Prius*, 131. As to what shall be deemed reasonable notice in the case of negotiable papers, that depends entirely upon the nature of the transactions between the parties. In some cases of drafts on bankers, the holder of the paper has been confined to a day, or one or two hours ; in other cases he has been limited to the next post. What shall be deemed reasonable notice, can only be inferred from the nature and intent of the contract, and must depend in every instance upon its own peculiar circumstances—no general rule can be applied to all cases, except that general one of giving reasonable notice. Now what was the true intent of this contract? It was that the assignee should institute suits against *Lewis* ; the assignment was made to give him a power so to do ; and that upon the event of his not getting payment from *Lewis*, he might resort to *Taylor*.—He was not by the nature of this contract (as it is generally understood in this country) to have any recourse to *Taylor* till after he had tried the event and issue of a lawsuit with *Lewis*. He was not bound to use diligence according to the technical signification of the word. Such assignments in this country, as they are explained by the common course of business, and as they are understood by the people, place the assignor in a situation not to be called upon till after actions commenced and tried against the obligors. *Alston* did use as much diligence as it was in the power of any man to use—he received the bonds in 1782, on the 10th December—he applied for and received

some part of the money soon afterwards—he continued to make repeated applications all through the year 1783, he sued soon after the year 1784, and immediately upon the death of *Lewis*—and before his suits were dismissed from the docket of the court in Virginia, knowing that an abatement must take place, he sued the executors in this State—immediately upon obtaining judgment here, without any delay he followed them into South-Carolina, and sued there, and before the determination of the suits there, discovering that these suits must be unsuccessful from the reversal of the judgments in this court, within a day or two after the reversal, he gave notice of all these transactions to *Taylor*. What more could he do? And what more could *Taylor* have done himself? He did not discharge *Taylor* from his liability by his conversation upon his return from *Lewis's* with the negroes. You are clear—was replied to a question on the part of *Taylor*, about *Lewis's* circumstances—the answer meant no more than that his circumstances are such as will indemnify you, or render it very improbable you will ever be resorted to. He concluded by expressing a hope that a decision would be in favor of the Plaintiff.

Judge WILLIAMS—Judge HAYWOOD was concerned in this cause, and has left the bench. I am sorry for it, as a cause similar to the present, came on at Salisbury at the last term, and his opinion was, that the rules respecting negotiable instruments did not apply to unnegotiable ones, though in fact passed by a debtor to his creditor; I mention this opinion now, because tho' I then differed, I am not now sure but it was the right one. These bonds were not negotiable in this State, and the assignment made here according to the case cited from *Bl. Rep.* must be governed by the laws of this country, and is to be considered as the indorsement of paper not negotiable, and may confer on the assignee only the powers attributed to such assignments in the argument for the Plaintiff; and if notice of non-payment by the obligor is not necessary, the Plaintiff may probably be entitled to recover on the special contract laid in the declaration, which is, that the endorsee should sue in the name of the obligee, and in case of his not being able to obtain satisfaction, should resort to *Taylor*. The greater part of the time elapsed since the indorsement, has been employed by the indorsee in pursuing the obligor—he sued within

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NOTE.—The opinion of the court *ex relatione*. It is certain however, that it was in favor of a recovery—either upon the ground that an un-negotiable paper, though indorsed, does not bind the indorsee to the same diligence, as if it were negotiable; or that the special contract not stipulating expressly for that diligence, the indorsee was not bound to use it, or that his suing within thirteen or fourteen months in his own name, was a using of sufficient diligence.

(395) NOTE.—On the trial of this cause the following points occurred and were decided. The Defendant offered a deposition, the notice for which was, that it would be taken on a certain day named, at Halifax court-house, in Virginia; the caption expressed a taking on that day, at the house of *Manning*, at Halifax court-house; and a witness sworn in court, proved that *Manning's* house stood about eighty yards from the court-house.

Per Curiam—It cannot be received. The receiving of evidence by depositions, is only adopted from necessity. It is subject to many abuses. If we begin to say it may be taken at a place near that fixed upon by the notice, it will open a door to fraud. The party may cause it to be taken near the place, whilst the adverse party may be waiting at the place appointed, in order to cross-examine. Besides if we once say that to take it near the place will do, we shall never know where to stop, it may be taken at a greater distance than eighty yards; one hundred for instance, or a quarter of a mile, and yet be said to be near. The deposition was rejected.

The Plaintiff offered the receipt of *Mr. German Baker*, late a counsel in Virginia, to fix the time when the bonds were put into his hands to be sued upon; and it was urged, that he was now dead, so that his deposition cannot be had; and that the receipt is the best evidence of that fact we can offer. That it was the course of business for counsel to give receipts when they receive bonds to sue upon, and that therefore the evidence offered should be received. Courts had done the like on other occasions, when the course of business rendered it proper, as in the case of the merchant's clerk who made the entries and died, and the merchant had no other means of proof but his hand-writing; it was admitted, as the course of business allowed of no better proof.

Per Curiam—Let the receipt be read, the course of business admits of no other proof. A record from one of the County Courts of Virginia was offered; it was certified by the clerk and presiding Justice, but no seal affixed, nor any certificate that there was no seal of the court.

Per Curiam—Where there is no seal, it should be certified there was none. We cannot know that there is no seal, unless it be certified; and if there be a seal, a record thus certified cannot be received, inasmuch as it is not attested in the most authentic way of which it is capable. In order to its admissibility therefore it must appear there is no seal by which it can be attested. So it was rejected.

Lutterloh v. Powell.

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A warrant that does not state that the sum demanded is over five pounds, but only that it is under twenty pounds, will not authorize an arrest, and if the officer makes an arrest under such warrant and afterwards permits the person arrested to go at large, he will not be liable for an escape.

Case, for an escape. The declaration stated that *Lassiter* was indebted to the Plaintiff in a sum under twenty pounds—that he took out a warrant against *Lassiter*, the tenor whereof was inserted in the declaration, and was expressed to be for a sum under twenty pounds—that *Powell*, the constable, received the warrant, arrested *Lassiter*, and suffered him to escape. The warrant, when produced, commanded the officer to summon *Lassiter*, to answer *Lutterloh* for a debt under twenty pounds.

Per curiam—After argument, by *Williams* for the Plaintiff, and *Davie* for the Defendant. If *Powell* was not authorised to arrest, and did arrest, and then suffered him to go at large, the action will not lie. If he had any authority to arrest it must be by force of the warrant—this is plain from considering the reason why the law requires a warrant in writing at all. It requires it, that the officer may be directed precisely what to do, that he may know how far he ought to go, and that he may produce it in his justification, when questioned for what he has done under it. The law will not permit that an officer shall proceed to arrest a man, and deprive him of his liberty, unless pursuant to an authority given him for that purpose. If he was permitted to act without a warrant in writing, he might mistake the verbal precept of the magistrate, and do either more or less than he was commanded. From the uncertainty of verbal directions, and owing to the not recollecting the precise terms of them, he might easily act otherwise than intended. For the benefit of the citizen therefore, that he may at all times be able to call upon the officer to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. Any thing contained in the directions of the magistrate or of the Plaintiff, that is not contained in the warrant, is no authority upon which the officer can act. This warrant, in the present case, is not such an one, as can in law justify the arrest.—The act of 1786. directs that where the sum is over five pounds, the constable shall arrest, and hold to bail. It

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Oct. 1796.  should appear in the warrant that the sum is over five pounds, otherwise he cannot arrest. This warrant does not state that the sum demanded was over five pounds, but only that it was under twenty. It might be also under five, and therefore the arrest was illegal, and releasing the Defendant in the warrant was proper and what he ought to have done. The Plaintiff was nonsuited.

NOTE.—*Vide Ellis v. Gee*, 1 *Murph.* 445.

Arnold v. Bell.

A debtor cannot dispose of his property to avoid an execution after it is issued. A disposition of any part of his property to a child by a father indebted more than he is worth, will be presumed fraudulent, unless the child can prove the purchase to have been made for a full and fair value actually paid. The declarations of the father that his conveyance to his child was fraudulent, are not admissible against the child.

(397) Detinue for negroes, *Tom*, *Jane* and *Anaky*. The Plaintiff produced a bill of sale from his father, *John Arnold*, dated the 27th February, 1795, for *Tom*: and another bill of sale, dated the 25th December, 1794, for the two other negroes. The Defendant proved a purchase of these negroes at the sale of a Sheriff, who sold them to satisfy an execution, issued for the State from Hillsboro' Superior Court, April term, 1794, for £900. He also produced a judgment rendered at October term, 1794, and an execution thereupon, returnable to April term, 1795, which was satisfied. The Plaintiff then proved an actual payment for *Tom*, of £100, on the day of the date of the bill of sale, and that this money was acquired by a sale of his own property, and that it was applied by the father in payments to his creditors—part of it towards the discharge of the execution of £100. As to the other negroes, he proved that before the date of the bill of sale for them, he had advanced monies to the father to pay his creditors, and that money was due from the father to him, for articles purchased for the old man, and delivered to him in the beginning of the year 1792, to the amount of £80. The father had not property enough to satisfy the execution for £900.

Per curiam—If when an execution is out, and in the Sheriff's hands, a man sells any part of his property, and the execution cannot be satisfied without selling that property, it may be sold by the Sheriff, and the previous sale

will be invalid and void. Here, the £100 execution was satisfied. Also, if a man be indebted to a larger amount than his property is worth, and he disposes of any part of his property to a child, although there be no execution issued, nor any judgment, it is void as to creditors, unless the child can prove the actual payment of a fair and full consideration; by which latter term is meant, a consideration so near the value, that it may reasonably be supposed the father would have taken the same from a stranger; and it must be left to the jury to determine, whether the consideration were a full one in that sense, or not. If they find in the affirmative, and that it was actually paid, *bona fide*, they will then find for the purchaser—otherwise, not. The jury found for the Plaintiff, and he had judgment.

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NOTE.—The Defendant at the trial of the issue in this action, offered a witness to prove certain declarations on the part of the father, under whom the Plaintiff claimed, tending to show the conveyance made to the son was fraudulent, and made to defeat creditors. It was stated that these declarations were a short time after the date of the bill of sale. On the part of the Plaintiff it was objected, that the father had given the bill of sale, and were he now present could not be admitted as a witness to impeach it for fraud. The law will allow no man to give evidence to invalidate an instrument himself has given.—*1 D. & E. 296. 5 Term 579. 3 Term 36. 4 & 5 Burr.*

E contra—It was argued, that the decisions in the case cited, apply only to negotiable instruments, that the witness offered has passed.—It would be attended with great mischiefs and injury to the credit of such papers, were they to be invalidated by him who has passed them after going through several hands. And though the maxim, *nemo eilegans turpitudinem suam est audiendus*, seemed to be adopted by some of the Judges in deciding these cases, it is evident from the reasons they give, that the rule established by these decisions, was meant to be particular, and not as general as the maxim.

Per curiam.—The decision to be given by this court, steers clear of the objection raised from the cases cited. The question here is, not whether the father shall be sworn to impeach a writing he has signed and delivered, but whether his confession may be given in evidence, to affect a third person, his son. A man's confession may be given in evidence to affect himself, but cannot, to affect any other person.—That evidence, were it allowed, would affect the Plaintiff, and not the father, who does not pretend to any interest in the negroes—therefore it cannot be received. It would be of dangerous consequence to allow such after declarations of a man who had passed property by the proper legal ceremonies—he might always overturn his conveyances. The evidence was rejected.

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NOTE.—Upon the point of the execution see the note to *Bell v. Hill*, ante 72. As to the admissibility of declarations see *Clark v. Arnold*, with HAYWOOD'S *query*, 2 *Hay* 287. *Gray v. Harrison*, *Ibid* 292.—*Elbank's Ex'rs v. Burt*, *Ibid* 330. *Guy v. Hull*, 3 *Murph.* 150, from which it appears that where the declarations of a person were made subsequently to the conveyance or transfer of his title, they are not

Oct. 1796. admissible against the party to whom such title was transferred; but if the declarations were made before the conveyance, as they would be good against the person making them, so they shall be admitted against any person who claims under him by a subsequent transfer.— But such declarations, where admissible, are not conclusive. *Ufford v. Lucas*, 2 *Hawks* 214.

Anonymous.

This was a writ of a false judgment, for reversing the judgment of a Justice of Peace given on a warrant. The Plaintiff in this writ had issued a *sci. fa.* to the Defendant, to appear and oppose the reversal if he thought proper; and now *Mr. Potter* moved, that as the Defendant had not come in, and so remained undefended, that he might be permitted to enter judgment of reversal.

Per curiam—If you have assigned matters of fact only, you may enter your judgment of reversal; if you have assigned matters of law, we must look into them. We cannot reverse the judgment merely because you have assigned instances of false judgment, if the matters assigned do not appear to warrant a reversal. The assignment was read, and the principal matter was, that no time or place was appointed within thirty days, by the Justice, for Defendant's appearance.

Per curiam—That is necessary by the act of 1794, c. 13, s. 3 & 6. The judgment was reversed.

Solomon Walker's Administrators v. Matthew Hawkins.

Detinue for negroes, brought against the intestate in his life time; upon whose death, the Defendants, his representatives, were called in and made parties; and there was a verdict against them, subject to the opinion of the court upon this question, whether an action of detinue will lie against executors, for the detainer of their intestate, and now *Gen. Davie* for the Defendant, moved for leave to enter upon the argument, saying he had prepared himself for it.

Per curiam—This point has been already decided in the negative, upon this circuit, in the case of *v. Hughes's* administrators, and formerly at Edenton.— So the judgment was arrested.

NOTE.—*Vide Chitty's Pleadings*, 120.

Campbell, Assignee, v. Mumford.

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A bond, upon which is an indorsement, purporting that it may be discharged by the payment of so much tobacco, is not negotiable under the act of 1786, *Rev. c. 248*.

Action upon a bond, for ninety-two pounds Virginia money, conditioned for the payment of forty-six pounds. Upon the back of the bond there was an indorsement purporting that the forty six pounds should be dischargeable in tobacco, delivered at a certain place. The Defendant objected to the Plaintiff's recovery, upon the ground that this bond was not assignable by the act of 1786, c. 4, and he cited a decision at Fayetteville, in the case of *Jamieson*, an assignee, v. *Farr*. (399)

Per curiam—The indorsement made at the same time with the bond, is to be taken as a part of the condition, (*vide 2 Term 641. Salk. 498. 6 Mod. 37*) and the bond is not assignable. A bond for any specific article is not assignable—such a bond in the hands of the assignee cannot be sued upon by him. Suppose at the day appointed for payment, the Defendant had tendered the tobacco, would it not have been a good tender? It certainly would, and would have discharged the debt. Until the day of payment then, the Defendant may consider it as a bond for tobacco only. These bonds do not answer the purpose of commerce as money, inasmuch as their value at the day of payment, is not easily ascertained, but is liable to be disputed between the parties and to produce delay. They were not rendered negotiable by the act of 1786, as money bonds were. It is true, if no tender be made at the day, the obligee may consider it as a bond for money only; but then if the bond is not originally negotiable, it cannot afterwards become so, for at the time of its creation the obligor did not mean to subject himself to the action of an assignee. Judgment for the Defendants.

NOTE.—*Vide Jamieson v. Farr*, and the note thereto, *ante* 182.

Pettiford v. Sanders.

A verdict had been obtained at this term against the Defendant, and now, *Mr. Potter* for the Plaintiff, moved that he might have execution against the Defendant, he being about to remove himself immediately, out of the State.

Oct. 1796. *Per curiam*—How do we know but a motion may be made to arrest judgment, or for a new trial, for some cause we know nothing of at present? All the proceedings of the court are *in fieri*, and in the breast of the court till the term be ended, and subject till that time to be altered and vacated. This cause may be accompanied by some of those many circumstances, that may render it proper to alter, vacate or set aside the proceedings, which have already taken place at this term. The motion was refused.

Burton v. Sheppard.

In an appeal from the court below, upon exceptions filed to the award of arbitrators, a new trial is not to be had in the Superior Court, but it will examine into the errors of law in the court below.

(400) This suit had been brought hither from the County Court of Person, by way of appeal; the general issue had been pleaded, and after depending in that court for some time, the parties agreed to refer it to arbitrators; and it was referred by a rule of court—the arbitrators met in the presence of the parties, and took the case into consideration, and made up their award. Exceptions were taken to it by the Plaintiff's counsel, one of which was, that the arbitrators had calculated interest upon the whole sum, from the time of payment, & had given no interest upon the amount of the verdict which accrued and became due some time before the arbitration. The cause being now moved by *Mr. Burton*, it was urged by *Mr. Whyte*, that according to the former decisions, this cause must now be tried upon the issue. The law requires whenever an appeal takes place from a trial below upon an issue joined to the country, that there shall be a trial *de novo* here; and in that predicament is this cause precisely.

Per curiam—If we should decide as the Defendant's counsel contends for, it would take away at one blow all references to arbitration in the County Courts. Either party dissatisfied, would file exceptions to the award, and appeal upon their being overruled. In such case, if this court proceed upon the issue, the award would be for ever excluded from consideration, and become a mere nullity, whether in point of law it were good or bad. The meaning of the law adverted to by *Mr. Whyte* is, that when the

party appeals from what he supposes to be the injustice or mistake of a jury, in their conclusions of facts from evidence, then that evidence shall be reconsidered by a jury here ; but when he appeals from what he supposes to be injustice or error in the judgment of the court, that then the court here shall reconsider what the court below has done. Were we to have new trials before a jury, whenever the court below gives a wrong judgment in point of law, the inconvenience would be great. The parties must then summon all their witnesses on both sides, to establish a verdict which is not complained of, nor sought to be rectified, and nothing is aimed at but correcting the judgment of the court, to the doing of which, no witness is necessary. We are therefore of opinion that the points in which the County Court is supposed to have erred, shall be considered here, in order to be corrected if wrong. A trial of the issue is entirely out of the question. Oct. 1796.

Quære—If an appeal can be regularly taken but from a verdict, or from a sentence on hearing of any cause, according to the act of 1762, *ch. 5*, or other similar acts, (in both of which cases there must be a re-examination of testimony) and whether other sentences and opinions upon mere matter of law, should not come up by writ of error ? (401)

NOTE.—*Vide Erwin & Wife v. Arthur's exr's. Conf. Rep. 490.*

Anonymous.

A writ cannot be altered from covenant to debt except by consent of parties: but it is usual among practitioners to permit the amendment, when the mistake was occasioned by the clerk.

This was an action upon a bond, with condition for the delivery of a specific article. The clerk had issued the writ in covenant instead of debt, and now *Mr. Norwood* moved to be at liberty to amend the writ.

Per curiam—It has been the constant rule amongst all the practitioners in this State, to amend writs improperly issued by the clerk ; but there is no rule of law giving us power to amend in such cases, without the consent of the party. There is nothing to amend by, and the amendment asked for is a very material one—it is to alter the most substantial part of the writ. There is no preceding act to resort to for proof, that the writs were not intended to be issued in covenant. An amendment of this sort

Oct. 1796. was once made by Judge ASHE, in Morgan Court, in the case of *McDaniel v. Tate*; but he declared it should not be drawn into precedent, but that he allowed the amendment to attain the justice which seemed in that instance most powerfully to demand it. A similar motion was made at Halifax, some terms ago, in the case of

v. the executors of *Webb*, and Judge MACAY said he could not permit the amendment to be made. The motion was to alter the word "executor" in the writ, and to substitute "administrator of all," &c.; and he said if the rule prevailed that writs might be altered in this manner, it might tend to entrap the bail, who perhaps agreed to become bail from the circumstance of being apprized that the writ in that form was not maintainable. We cannot allow of the motion in the present case, but we recommend it to the opposite counsel to agree to the amendment, as it is agreeable to the course of practice for the Defendant's counsel to agree to such amendments, and as the amendment proposed will put the Defendant under no difficulties with respect to his defence, it being the very same after the amendment as now. Prior to the late decision on sealed instruments without a witness, many actions had been brought in case upon them; and upon the recommendation of the court they were altered by consent to debt. The Defendant's counsel would not consent to the amendment, and the suits were dismissed.

NOTE.—Vide note to *Cowper v. Edwards*, ante 19.

Robertson v. Stone.

The appellant applied in time to the clerk for the papers, but could not procure them. The papers were, however, brought up after the 15th day before the term, and a motion was made to have them filed. Upon the motion's being opposed by the appellee, it was refused upon the ground that the party had his remedy against the clerk. It seems if there had been no remedy against the clerk, the papers might have been filed.

(402) This was an appeal from a verdict in Person County Court. The appellant applied in time to the clerk of the County Court for the papers, but could not procure them. The papers, however, were brought up after the fifteenth day before the term, and the appellant moved to have them filed, and the cause placed on the trial docket. And now at this term, the appellee came in to shew cause against the motion. He insisted that if the appellant could not procure the papers from the clerk of the County

Court, as he alleged, that was no reason for setting the cause now down for trial, as the act of 1777. c. 2. s. 87, had expressly provided for such a case: namely, that the clerk should forfeit fifty pounds to the appellant, and also all damages sustained by reason of such delay or refusal. Oct. 1796.

Per curiam—A case happened some time ago at Edenton, which has been cited as the ground of this application; in that case the appellant offered his appeal papers to the clerk of the Superior Court in the streets, not at his office, and the clerk for that reason refused to receive them, apprehending he was not bound to receive them but in his office; and the court ordered the appeal papers to be filed, being of opinion the appellant had no remedy against the clerk. In this case, as he has a remedy prescribed by law, it is proper he shall pursue that. Were his case such as shewed him to have been guilty of no neglect, and at the same time that he had no remedy against the officer, the court would sustain his appeal to prevent a failure of justice, but that is not the present case.

The motion was overruled.—It might, perhaps have been improper to allow of filing the papers by way of appeal, for the appellee might have been at the office on the 15th day before term, to know whether they were filed or not; but *quere*, if they might not have been brought up by *certiorari*, *et vide ante*, *Chambers v. Smith*.

NOTE.—*Vide Hord v. Orr*, *N. C. Term Rep.* 151, where this case is recognized and confirmed.

Anonymous.

The fifteen days before the term, in which appeals must be filed in the Superior Court, must be clear of the day of filing the papers and of the first day of the term: at all events, of the first day of the term.

In this case, it was moved by *General Davie*, that the appeal should not be received, there not being fifteen days between the filing of the appeal papers and the first day of the next term, and he cited 2 *Bl. Rep.* 922. 1 *Str.* 407—as a similar case being founded upon a rule of court, which had the words “at least,” in the same manner as the act of 1777. ch. 2, sec. 84, where the expression is, that the record of the suit shall be delivered to the clerk of the Superior Court, at least fifteen days before the sitting of the term. In the case in *Strange*, one day was

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(403)

held to be inclusive and the other exclusive ; and if that computation prevail in the present instance, the record was brought up too late : for there are not fifteen days before the term, unless the day of filing and the first day of the term are both included.

E contra—*Williams* cited *Salk.* 599 pl. 7. 2 *Stra.* 765.

Per curiam—*WILLIAMS* absent. Whether the fifteen days are to be accounted inclusive or exclusive, depends not upon any practice of the British courts, but upon the meaning and design of our own act, which seems to have been, that the appellee after coming to the clerk's office, and finding the appeal lodged there, might have fifteen days for travelling to the most distant part of the State, to procure attendance of witnesses, and returning to the court, and in otherwise preparing for the trial ; but if the fifteen days are to be accounted inclusively, he will have but thirteen days allowed for those purposes. The fifteenth day is employed in travelling to the office and getting process, and the first day of the term he must be present in court ready for his trial. If we allow one of them to be inclusive, and the other exclusive, there will remain but fourteen days. There should be fifteen clear days—at all events, the first day of the term must be excluded. The case was adjourned to search for precedents on the application of the appellant's counsel.

NOTE.—Overruled, *Anonymous*, post 462.

State v. Bradley.

The indictment stated, that *Gatling* sued *Herndon*, a constable, and others, for selling his cattle, upon an execution, at a different place from that advertised ; and that upon the trial of this action in the County Court, it was a material question, whether *Gatling* interrupted the constable, in driving the cattle to *Gatling's* house to be sold ; and that the Defendant *Bradley* was introduced as a witness, and was sworn, and upon his oath deposed, that *Gatling* did not interrupt the constable in driving the cattle to *Gatling's* house. The evidence was, that Defendant swore, *Gatling* did not assist in driving the cattle from the officer—the falsity of this oath was sufficiently established.

HAYWOOD, Justice.—I doubt whether we have power to say, the oath sworn by the witness is tantamount to

that imputed him in the indictment. We cannot imply Oct. 1796.
 that one thing is tantamount, or equivalent to another, in indictments. Were the Judges allowed this power of implication, they might whenever they thought proper, construe the offence proven to be tantamount or equivalent to that laid in the indictment, when according to strict propriety and common acceptance, it was essentially different; and a Defendant who had prepared himself to falsify the charge as laid, might find himself surprised with evidence constructively tantamount, though not properly and strictly applicable to that charge. I do not recollect any cases upon this head at present—none have been cited—but this case seems to fall under the operation of a general principle, of vast magnitude in a free country, where the law is to govern—a sacred principle never to be evaded, nor ever to be thought of but with reverence. It is the best security the citizen has against judicial tyranny. I hope, therefore, the verdict may be so taken, as to bring this point before the court. In all other respects I agree, that the Defendant ought to be found guilty. He was found guilty, but the verdict was made subject to this point, *et adjournatur*. (404)

NOTE.—*Fide S. C. post 463.*

Kennedy & Co. v. Fairman.

Per WILLIAMS, Judge. A notice to take a deposition ought to be served upon the person of the other party. HAYWOOD, Judge. Leaving the notice at the residence of the adverse party, is a sufficient service.

The Plaintiff offered to read depositions, and proved the notice of taking them, to have been left at the place of abode of *Fairman*, he being, as it was said by the family with whom he lived, then absent; and that at another time, a notice was left at a house in Hillsborough, where the deponent saw a man through the window whom he believed to be *Fairman*.

Judge WILLIAMS (after argument, *Williams* for the Plaintiff and *Davie* for the Defendant)—The notice ought to be personally served upon the Defendant—otherwise, a man might contrive to leave notice at the house of his adversary, after he was gone upon a journey; and take the deposition either before his return, or so soon after, as would put it out of his power to repair to the place ap-

Oct. 1796. pointed, and thus deprive him of the benefit of cross-examining the witness. The instance given at the bar is a proof, that we should hold a strict hand over this kind of evidence—the person intending to take the deposition, waited till he saw his opponent on his journey to New-York, where he had very important business to transact, which necessarily must detain him beyond the time specified in the notice.

(405) Judge HAYWOOD—I am of opinion the deposition should be read ; what is sufficient service of notice in other cases should be deemed so in this. The law supposes in other cases that the notice left at his place of abode, actually comes to his knowledge, and proceeds against him upon that supposition. If notice to a juror be left at his place of abode, and he does not attend, he shall be fined. 1779, *ch. 6, sec. 6.* So of a witness, 1777, *ch. 2, sec. 36.* Such notice of a declaration in ejectment is sufficient—so of a subpoena in chancery to answer. 1 *Harrison* 251.—So of a notice in chancery to take depositions, if it be left at the place of abode of the opposite party, the other party may proceed to take his depositions, and they will be good. 2 *Harrison* 29. It may indeed sometimes happen that the notice may not actually come to the party's knowledge, (see 2 *Str.* 1044) and the deposition may be taken *ex parte*. This may be obviated by his moving the court to postpone the cause, upon an affidavit of the notice having not come to his knowledge, till he can have an opportunity of taking the deposition of the same witness himself, and by that means to have the benefit of a cross-examination. It is better to adopt this mode, than to require a notice to be personally served, and to throw a temptation in the way of the party to conceal himself. For then as long as he can keep out of the way of personal service, he defeats his antagonist of a trial ; whereas by allowing a service at the house to be good, he has no such temptation, as a concealment of his person will not hinder the taking of the deposition, and they will be read when the trial comes on in course ; unless upon affidavit he can shew a fair cause to the court for a continuance. If we require personal notice in all cases, many persons will be tempted to adopt measures to prevent the service of it, and to hinder the course of law by their own dexterity. The court differing, the deposition could not be read, and the Plaintiff was nonsuited.

Anonymous.

Oct. 1796.

A motion to dismiss a cause brought up by a *certiorari*, was made upon the ground, that the notice which had been ordered at the last term to be given to the Defendant, had not been given; but it appearing that the Defendant had entered an appearance by the initials of his attorney's name, being placed on the docket, the motion was refused.

A *certiorari* had been obtained for the removal of the records of a cause from a County Court into this court, returnable the term before last, and no notice of this *certiorari* having been served on the adverse party, the court at the last term, ordered such notice to issue, and at this term no notice having been served, the Defendant in the *certiorari*, by *Mr. Duffy* his attorney, entered an appearance in the usual form, namely, by writing the initials of the attorney's name to the suit on the docket; and now *Mr. Duffy* moved for a dismissal of the *certiorari* for want of notice to the Defendant, according to the rule of the last term; and he urged, that as no process was issued to give notice from the last term, that was of itself a discontinuance of the whole cause. (406)

Per curiam—When a *certiorari* is obtained to remove a cause from a court below, the adverse party should have notice, to the end he may appear and oppose the motion for a new trial if he thinks proper. As the court at the last term ordered process to issue from that term, it must now be taken that the cause was not then discontinued—had it been, no such process would have been ordered, but a discontinuance would have been entered, or a *procedendo*. Then notice should have issued from the last term; and it appears now, that no process for that purpose has actually been served since, but the Defendant's attorney has entered his appearance and moved on behalf of the Defendant for a dismissal, and this is proof that the Defendant had notice. It is always so taken. *Vide 1 Stran. 261. 2 Stran. 1072. Salk. 59.*—The object of process is to give notice to the Defendant, and to bring him into court; but if he chuses to come in voluntarily, that supersedes the necessity of process.—The entering the initials of the attorney's name on the docket, is the usual mode of appearing here practised, and is looked upon as equivalent to his having a power of attorney for that purpose, signed by his client, as prac-

Oct. 1796.  tised in the English courts. Such a power, and an appearance in consequence thereof, is a waiver of all objections for irregularity or want of process, if the adverse party chuses so to consider it. The motion to dismiss was refused.

State v. Dickens.

In an Indictment for extortion in taking more than the legal fee, it is no excuse that the Defendant did the act through mistake, or under improper advice. An indictment for extortion in the County Court, stating the day on which the offence was committed in *figures*, and also omitting the word *extorsively* in charging the taking the unlawful fee, may be supported under the act of 1784, R. c. 210. It is not necessary to state what the lawful fee is, in an Indictment of this kind.

(407) Indictment for extortion, on taking eight shillings for a guardian bond; and not guilty pleaded. On the trial the Defendant's counsel insisted, that according to the rate of fees, in the fee bill published by the Secretary, the clerk is entitled for every order foreign to a cause in court, to two shillings; and for every guardian bond six shillings: although in the act from whence the extract is taken, he is entitled for every guardian bond including all services thereon, to six shillings only. The latter words were omitted by the Secretary out of the rate of fees published by him, and as the clerk might have been misled by the rates published by public authority, it cannot be said he took the excess corruptly. Also, it was proven in this case, he was advised by an old practitioner that he might demand eight shillings, before which advice he only took six. This proves him to have been mistaken in the fee allowed by law, and it shews the innocence of the mistake; and if the jury cannot say from the evidence they hear, that he did it *extorsively*, or with a corrupt or oppressive motive, they cannot pronounce him guilty.

Per curiam—WILLIAMS absent. As to the rate of fees published by authority, and collected from different acts of the Legislature, that was for the benefit of the people at large, that any one might know at once by inspecting the rates, when an officer demands more than was his legal fee. It was not intended to change the law—every officer is bound to know what the law is upon the subject of fees to be taken by himself. He cannot excuse himself

from taking more than the legal fee, by saying he was Oct. 1796.
 misled by the rates published, or by the advice of an attorney, nor by any other excuse he can make. If such or the like excuses were admitted, it would hardly ever be possible to convict an officer of extortion—he might always contrive to ground his conduct upon misapprehension or improper advice.

The jury found him guilty. Afterwards, his counsel moved in arrest of judgment, and assigned several reasons, the principal of which were, that the day on which the offence is said to have been committed, is stated in figures. Secondly, that the receipt of the eight shillings is not laid to have been committed extorsively. Thirdly, that it is not stated in the indictment what was the legal fee.

Per curiam—(WILLIAMS absent and the counsel agreeing to submit it to the decision of the Judge in court)—This is an indictment originally found in the County Court, and brought hither by appeal. It is therefore entitled to the aid of the act of 1784, *ch. 31, sec. 3*, which directs that in all criminal prosecutions thereafter to be had by indictment or presentment in the County Courts, it shall be sufficient to all intents and purposes, that the bill shall contain the charge against the criminal, expressed in a plain, simple, intelligible and explicit manner; and that no bill of indictment shall be quashed, or judgment arrested, for or by reason of any informalities or refinements, where there appears to the County Court sufficient in the face of the indictment to induce them to proceed to judgment. The first fault pointed at, is certainly cured by this act—the meaning though expressed in figures is as well known to the court as if it had been expressed by letters, though perhaps an indictment drawn in this court originally, might have been vitiated by stating the day in figures. As to the second exception, had the indictment been originally found in this court, the omitting to charge it to have been taken extorsively would have been fatal, the precedents all being that way; but having been drawn in the County Court, we have only to consider whether enough appears upon the face of the indictment, to point decidedly and substantially at the same circumstances, as is expressed by the word extorsively. It is stated that he took eight shillings for a certain service by colour of his office, and for wicked gain

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sake. Now it is known to the judges here, as being part of a public act, that eight shillings is above the legal fee for that service ; it can therefore appear to them in no other light than that of an extorsive taking ; and we cannot say under the act referred to, that there is not enough of substance to enable us to pronounce the offence charged, to be that of extortion. As to the other exception, it is not necessary to state what is the lawful fee, even in an indictment preferred originally in this court ; if no fee was due, the indictment says—whereas no fee whatever was due to the said A. on that account. If not so much is due, the indictment states—whereas no such fee was due to the said A. on that account, or for that service—and this has always, in times of the greatest strictness, been held well. But the attorney for the Defendant pressing to have time to search for authorities, and this being consented to by the Solicitor-General, the case was adjourned.

NOTE.—*Vide 2 Chitty's Crim. Law* 295, where it is said—"where nothing at all was due, that fact ought to be averred, and where any thing was due, the sum which might have been lawfully taken, must be expressed."

Kennedy & Co. v. Fairman.

Ten days notice must be given to the creditors before taking the insolvent debtor's oath. An insolvent debtor shall not be discharged if he will not account for property proved to have been in his possession shortly before, and sold to one who had acted as his partner in trade.

General Davie presented a petition to this court, stating the imprisonment of *Fairman* at the suit of the Plaintiff for the space of twenty days, and prayed that he might be admitted to the oath of an insolvent debtor and discharged, and the court appointed a day for him to be brought up ; and now on this day, being the last of the term, he was brought into court accordingly, and prayed by his counsel to be sworn and discharged. *Mr. Williams* objected, because he had not given notice to the Plaintiff's agent, who lives in this place, ten days before the present, but one or two days notice only. It will be contended on the other side, that ten days notice is not required by the act—the first clause directs notice in general to be given without specifying for what length of time ; a subsequent part says, the creditor or creditors

being noticed according to the directions of this act.— Oct. 1796.
 Then in the latter part of the act, speaking of notice to
 be given when a schedule of effects is to be rendered by
 the debtor, it directs ten days notice to be given, and
 this is the part of the act referred to by the words (ac- (409)
 cording to the directions of the act) in the foregoing part;
 by which the Legislature meant to express ten days no-
 tice. It was argued *e contra*, General Davie.

Per curiam—Notice must be given that is expressly re-
 quired—if there is no length of time prescribed in the
 act, it ought to be a reasonable time; and what is a rea-
 sonable time cannot be better ascertained than by refer-
 ring to the time the Legislature has appointed in a simi-
 lar case—the latter part of this act appoints ten days
 notice to creditors, whose debtor is about to deliver a
 schedule of his effects—the preparation for these credi-
 tors to make, is no greater than the preparation to be
 made by those of the other class, and therefore as long
 time should be given in the one case as the other: but
 in truth this act does provide that ten days shall be
 given in the case now before the court. The true mean-
 ing of any written instrument is best collected from a
 view of the whole, *et antecedentibus et consequentibus*.—
 Notice is required in the first part of the same clause, in
 a subsequent part of the same clause it is required again
 with the addition of the words, according to the direc-
 tions of this act; and by the latter part of the act, notice
 of ten days must be given to the creditor of a debtor
 about to deliver a schedule. We are if possible to give
 every word some operative meaning, but we should give
 no meaning at all to the words, according to the direc-
 tions of this act, if we say they mean nothing more than
 the preceding words had expressed, or notice in general.
 Indeed, according to the construction of the petitioner's
 counsel, the whole of this sentence, so far as it re-
 lates to notice, is nugatory—notice having been di-
 rected before. Something more therefore must be
 meant by the additional words, according to the direc-
 tions of this act—it has reference to what is expressed in
 some other part of the act, having another meaning than
 that part of the sentence to which the words are addi-
 tional, and that must necessarily be the term of ten days
 expressed in the latter part, by a reference to which
 these words have an effect and meaning, and complete
 the sense of the first clause directing notice, which other-

Oct. 1796. wise would be incomplete and uncertain for want of defining the time—therefore the acts provides ten days notice to be given; it has not been given in the present case, and the petitioner cannot be discharged. So he was remanded.

(410) At April term, 1797, another person presented his petition to the court by *Robert Bell*, his attorney, to be admitted to the oath of an insolvent debtor and discharged, but he had not given ten days notice.

Et per curiam—HAYWOOD and STONE—That is necessary by the spirit of the act, and they remanded him.

NOTE.—*Fairman* petitioned Judge HAYWOOD, in the vacation following this term, who granted an *habeas corpus*, and *Fairman* was brought before him and the notices were admitted; but it being proved that not long before these judgments obtained, for which he was imprisoned, he had sold property to the amount of eleven hundred pounds to one *Coghlin*; who it was proven had subscribed receipts and taken notes as the partner of *Fairman*, and it being also proven that *Fairman* was present when money was lent by *Coghlin*, and a note taken in the name of *Fairman* and *Coghlin*, the Judge required him to shew the application of that money; and he being not able to do so, nor willing to attempt it, though a month's time was offered him for that purpose, and that he should be again brought up at the end of the month, he was remanded.

NOTE.—*Vide* the act of 1822, c. 3, which prescribes that no person shall be imprisoned upon any *ca. sa.* for any debt contracted after the 1st day of May 1823, who will comply with the requisites of the act, without fraud or concealment.

FAYETTEVILLE. OCTOBER TERM, 1796.

Wilcox v. Ray.

A copy of a record should be *verbatim*, and not be certified by the clerk that such things appeared to him from the record. The loss of a record must be proved by the oath of some person, and not by the certificate of the clerk.

Ejectment. The Plaintiff stated his title to be derived under *Simpson* the patentee, against whom the State recovered a judgment, upon which execution issued, and the land in question was sold to him to satisfy it, on the 25th November, 1768. He produced the patent to *Simpson*, and offered what he called a copy of the record of the judgment and execution. It was a certificate of the clerk setting forth that it appeared to him from the docket, that a judgment had been entered for so much, and that an ex-

ecution had issued, and that the rest of the record except what appeared upon the docket, was lost. *Mr. Moore* objected, that as to that part of the record which was lost, if it were a fact, it should be proven by some person on oath; the clerk not being appointed by law to certify the loss of a record, his certificate upon the subject was of no consequence, and as to those parts of the record which he had certified, they could not be received—for he had only given a history of the record as it appeared to him, whereas the very words should be copied, that the court might judge of the true import of it. The clerk may mistake the meaning of the entries, and draw improper conclusions from them. And of that opinion was the court, and refused to receive the certificate, and the Plaintiff was nonsuited. Oct. 1796.

NOTE.—*Vide State v. Norman*, 2 Dev. Rep. 222.

Park v. Cochran and others.

Ejectment. The Plaintiff stated his title to have been derived under a patent to *Newberry*, who conveyed to *Carrol* and *Dyer*, who conveyed to the Plaintiff. He offered to produce an office copy of the deed from *Carrol* and *Dyer*; *Mr. Williams* objected to the reading of it, unless the Plaintiff would swear he had not the original in his possession or power. (411)

Per curiam—The copy cannot be read, unless the Plaintiff will swear he has not the original nor can procure it. The Plaintiff was nonsuited.

NOTE.—*Vide Blanton v. Miller*, and note thereto, ante 4.

Evans v. Norris's Administrators.

An account against the Plaintiff cannot be given in evidence under the plea of payment. A retainer may either be pleaded, or given in evidence, under the plea of *plene administravit*. An administrator is bound to pay debts already due, before those not yet payable. An administrator cannot retain against debts of superior dignity. Voluntary payments after the *teste* of the writ are not allowable; they are certainly not if made after plea.

Case. General issue, payment, and *plene administravit*, pleaded. In support of the plea of payment, the Defendant offered an account which the intestate had against the Plaintiff.

Per curiam—The account against the Plaintiff cannot be admitted to prove the plea of payment, the Defendant

Oct. 1796. should have pleaded the general issue, with a notice of set off; then the Plaintiff would have been made acquainted with the particular items, and might have prepared himself with evidence to contest them. If we allow an account to be proved without being pleaded in bar, or notice of set off given to the Plaintiff, he must necessarily be unprepared to contest it, however erroneous it may be. If such accounts by rules of the common law, were adducible by the common law to prove the plea of payment, it was unnecessary to have made the acts for setting off mutual debts and accounts against each other. The account was rejected. The Defendant then proved the intestate had purchased a house of him, and agreed to give three hundred pounds for it, to be paid by three yearly instalments; one of which payments was due before the institution of this action, and that he had retained an hundred pounds of the intestate's estate in his hands to satisfy it. *Mr. Hay* urged that a retainer could not be given in evidence, unless it had been pleaded. *Mr. Taylor, e contra*, insisted, that a retainer may be given in evidence under the plea of *plene administravit*, and cited *Esp.* 249.

Per curiam—A retainer may be either pleaded or given in evidence under the plea of *plene administravit*. 3 Burr. 1380. Had the administrator paid a debt of an hundred pounds to a third person, he might certainly have given it in evidence under the plea of *plene administravit*; and payment to himself is in the same situation—there is nothing to differ the two cases. The evidence was given as to the other two hundred pounds not yet due. *Mr. Taylor* argued, that the same was a debt due *in presenti* at the death of the intestate, and that the administrator immediately upon the death of the intestate was entitled to pay himself in preference to another creditor.

Per curiam—An executor or administrator is bound to pay those debts that are already due, in preference to those not yet payable. *Off. of Ex.* 142, 143. The Defendant next proved several payments made after the date of the leading process in this suit, and several after the plea filed.

Hay—As to the one hundred pounds due at the time of the intestate's death, I admit the administrator may retain that sum to satisfy his own demand, in preference

to any other creditor of the same degree with himself, or of an inferior degree. By the act of 1786, *ch. 4. sec. 2*, notes of hand, and liquidated and settled accounts signed by the debtor, are put upon the same footing with respect to payment by executors or administrators, as debts due by specialty, and our demand is grounded on a note of hand. Bond creditors have always been entitled to be paid in preference to simple contract creditors. *Esp. 248, 252, sec. 4.* The hundred pounds attempted to be retained is due by simple contract only, and cannot as I contend, be retained to the prejudice of the Plaintiff, whose demand is equal in point of dignity to a specialty debt. As to the voluntary payments made after the date of the *sci. fa.* they do not support the plea of *plene administravit*—one essential part of that plea being, that on the day of suing out the original writ, or at any time afterwards, the Defendant had not in his hands to be administered, any part of the goods or effects of the intestate. A proof of payment made after that day, is so far from being a proof of the plea, that it proves there were assets to the amount of the payment at least, in the hands of the administrator after the teste of the writ. In all events, such payments as were made after the plea pleaded, cannot be received to support it: the plea must be true at that time or it will not be of any avail to the Defendant. It must be true at that time at least, that there were no assets in the hands of the administrator, to be administered.

Mr. Taylor, in reply—If an executor has no notice of a bond debt, he may pay a simple contract creditor; and that notice must be given by an action actually commenced. He may pay himself before such notice, as well as he may pay another creditor, otherwise, the executor would be in a worse situation than another creditor, and in that situation the law means not to place him. No notice of the note now sued upon, was given to the administrator before his retainer of this hundred pounds. As to the payments made after the teste of the writ, and before the plea pleaded, they are surely to be allowed to the administrator; for the writ may be taken out and lie in the Sheriff's hands many months, before any notice of it be had by the administrator. It would be excessively unjust to disallow payments made fairly and innocently, before any notice had of a debt of superior dignity. It

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Oct. 1796. was lately decided at Wilmington, at the last term, that the plea of fully administered, related only to the time of the pleading, and that if the administrator had fully administered at that time, it was sufficient.

Per curiam—An executor or administrator can only retain to satisfy his own demand, when it is of equal dignity with that of the creditors to whose disadvantage it is retained—as the executor cannot sue himself, he is allowed to pay himself by retainer. The law in his favor presumes, that had he not been executor, he would have used equal diligence with any other creditor to procure payment, and places him with respect to paying himself in the same situation as if he had used the most expeditious diligence; but he cannot retain to satisfy himself whilst there are debts of a superior dignity to his. By the act of 1786, notes are put upon the same footing with bonds, and are made superior to any simple contract debt, where the debt is not liquidated, and settled and signed by the party to be charged; of course, the debt due in the present case to the administrator, cannot be satisfied by retainer in preference to the debt of the Plaintiff, which is by note of hand. As to the voluntary payments made since the teste of the writ, and before the plea pleaded, in strictness, they are not allowable; though indeed, it seems to be a hardship that payments made before notice of the writs, and with no design to prejudice the Plaintiff, should not be allowed. As to the payments made after the plea pleaded, they are clearly not allowable.

NOTE.—That part of the court's opinion relative to the payments made after the teste and before the plea, seems not to be correct; the law as laid down in the *Off of Ex.* 145, 146, is, that the executor may pay another creditor after suit commenced, before he have notice, and may then plead that he was not summoned till such a day, before which, he had fully administered.

NOTE.—Upon the first point decided in this case, see *McDowell's admr's. v. Tate*, 1 *Dev. Rep.* 249, in which it was held that an account signed by one with another, whose bond the first holds for a larger amount, should be left to the jury as evidence of a payment on the bond. With respect to the payment of debts and of retainer by executors and administrators, the law of this state has followed the English law, except that notes of hand and liquidated accounts signed by the debtor, are put upon the same footing with specialty debts. By reference to *Toller's Law of Executors*, it will be found that all points adjudged in this case, are sanctioned by the English authorities, except that the position, that administrators and executors are bound to pay debts already due in preference to those not yet payable, is qualified by confining it to debts of equal dignity; and that after a suit is commenced the adm'r. or ex'r. may pay any other creditor, before he

has notice of the Plaintiff's demand. Indeed, *Haywood the Reporter*, Oct. 1796: adds a *quere* to this last point, both in the principal case and in *Surr. Partners of McNaughton & Co. v. Blocker's adm'r.* post 417—and the authorities upon which he relies are recognized in the treatise above referred to. See *Toller's Law of Executors*, from 281 to 297.

Pearle v. Folsom.

A discharge under the insolvent debtor's act, ordered by the proper officers, will be presumed to have been regularly done, until the contrary be shown. Under the first insolvent act, the Defendant was discharged only as to those who had commenced suits against him, and had notice given them of the debtor's petition.

Covenant, for certificates which Defendant borrowed, and agreed to return or pay for in money at the rate of 4 shillings in the pound. Amongst other pleas, the Defendant pleaded, that he had been discharged of the action under the insolvent debtor's act. He produced a petition setting forth his imprisonment at the suit of another creditor, and praying the benefit of that act, 1773. c. 4. He also produced the return of the goaler, by which it appears he was in also at the suit of the present Plaintiff. He also produced the subsequent proceedings, shewing his having taken the oath prescribed in that act, and his having been discharged. It was argued on the other side, that he ought also to produce the notice served on the present Plaintiff, of his being about to take the benefit of the act—the evidence offered did not amount to a proof of notice. It was answered, that the giving of notice, is a circumstance incident to the business of his discharge, and must have been proved to the Justices of the Peace before they proceeded—since they have discharged him, the court here will presume, that all things preparatory to his discharge, were rightly and legally transacted, and they cited *Bull. Nisi Pri.* 173. (414)

Per curiam—Since there is a discharge ordered by the proper officers of justice, we will presume all circumstances required by law to precede the discharge, to have been regularly observed; otherwise, we must presume, that the Justices have acted illegally: which is a presumption never entertained against the proceedings of officers of justice. If in fact they have proceeded to discharge without notice, and the creditor will shew that, it will vitiate the proceedings. The presumption of *omnia recte acta*, lasts only until proof of the contrary appear; but we will not require the Defendant to prove notice to

Oct. 1796. have been given, the Plaintiff not being able to shew any irregularity in the proceedings. There was a verdict for the Defendant.

One other point was moved in this cause, namely, whether the Defendant by a discharge under the first branch of the act, was discharged as to all creditors, or as to such only who had instituted suits against him at the time of his imprisonment.

Et per curiam—Clearly, before the late act which has made some alteration, he was discharged only as to such creditors who had commenced their suits, and had notice given them of the debtor's petition.

NOTE.—*Vide Burton v. Dickens*, 3 *Murph.* 103. *Howard v. Pasteur & Price*, *Ibid.* 270. *Jordan v. James & Marshall*, 3 *Hawks* 110.

Hodges v. Blount.

Property sold remaining in the possession of the vendor where there is an absolute bill of sale, is evidence of fraud: so is the not registering the bill of sale till long after it is made, coupled with an offer on the part of the vendor to antedate.

(415) The 16th May, 1789, *Lassiter* sold to the Plaintiff the negro in question. *Lassiter* derived his title under *Lucas*, who made a bill of sale to *Rayford* on the 10th of August, 1788. The Defendant, *Blount*, who in fact acted for *Worseley*, who was the real Defendant, produced a bill of sale from the same *Lucas* to *Worseley*, dated the 5th of March, 1788. It was proved *Rayford* gave a valuable consideration. No consideration on the part of *Worseley* was proven, and the negro was in possession of *Lucas* on the 5th of March, 1788: *Lucas* having been sued and given bail, they were about to surrender him, and that he offered to give them a bill of sale for the negro, and to antedate it so as to give it a preference to *Rayford's*.

Per curiam—It is alleged that the bill of sale to *Worseley* is fraudulent, and if it is, the law says it is void. It is not sufficient however to allege fraud—it must be proven either positively and directly, or by circumstances, which is the most usual way, there seldom being any direct proof of fraud to be had. There is no positive proof of fraud on the part of *Worseley*, but circumstances tend that way: he did not take the negro into possession, he remained with *Lucas*, though the sale purports to be an absolute one. No other evidence offers any substantial

reason in explanation of this circumstance. *Lucas* also kept possession after the bill of sale to *Rayford*, but the cause of this is explained. It is not proved that *Worseley* gave any valuable consideration, though it is proved on the part of *Rayford*. *Worseley's* deed though purporting to be dated so long before *Rayford's*, is not admitted to registration till after; which circumstance added to the proof of *Lucas's* offering to antedate, if his bail would not surrender him, weighs something. The jury found for the Plaintiff, and there was a motion for a new trial; but the court being satisfied with the verdict, refused it.

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NOTE.—Where the possession does not accompany and follow the title, the transaction is fraudulent in law. *Gaither v. Mumford*, N. C. Term Rep. 167. But several cases, both before and after that case hold that such possession is only evidence of fraud; see *Cox v. Jackson*, post 423. *Ingles v. Donaldson*, 2 Hay. 57. *Vick v. Keys*, *Ibid.* 126. *Falkner v. Perkins*, *Ibid.* 224. *Bell v. Blaney*, 2 *Murph.* 171. *Trotter v. Howard*, 1 *Hawks* 320. *Smith & Stanly v. Niel & others*, *Ibid.* 341. — *Howell v. Elliott*, 1 *Dev. Rep.* 76.

Anonymous.

Mr. Hay produced several executions which had been delivered to the late Sheriff of Anson, who had returned levied, and not sold for want of bidders. Also, several writs of *venditioni exponas* issued upon these returns, and stated that these latter writs were put into the hands of the late Sheriff before his going out of office, and to the present Sheriff he had not pointed out any property which he could sell according to the exigence of the writs. He moved that the late Sheriff should be amerced, under the act of 1777, ch. 8, sec. 5.

Per curiam.—Let him be amerced; he ought to have made a return to the writs of *venditioni exponas*; he ought to have sold the property, though no writs of *venditioni exponas* had issued: and having once taken it, he cannot afterwards put it upon the new Sheriff to execute these writs. Let there also issue writs of *distringas* to the new Sheriff, to compel the late Sheriff by distress to to levy the monies, and deliver them to the new Sheriff, to be brought into court.

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NOTE.—*Vide Gov'r. to the use of Holliday's ex'r's. v. Eastwood et al.* 1 *Dev. Rep.* 157.

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Where the act of limitations begins to run against a *feme sole*, her marrying will not suspend its operation.

This was a special verdict, in which the question was stated to be, whether a *feme sole*, against whom the act of limitations had begun to run, could by marrying, suspend the operation thereof, or whether it would run on, notwithstanding the coverture.

Per curiam—WILLIAMS and HAYWOOD. This is a plain question: it is clear law when the act once begins to run, no incapacity to sue, as coverture or the like, intervening before the three years are completed, will prevent its running on so as to form a bar.

Mr. Moore however, urged that there never had been any decision in any court to that effect, either in England or here. He said such an opinion was intimated at Wilmington, at the last term, by Judge HAYWOOD, alone on the bench. That he had heard of such a doctrine before, at the time *Mr. Iredell* was at the bar, and had been furnished by him with a list of authorities upon which *Mr. Iredell* had formed such an opinion; but upon examining them attentively, they are found to be *dictums*, grounded on the case of *Touch &—Plowden*, 368—which was a case adjudged upon the statute of fines.

Judge HAYWOOD—After the opinion I gave at Wilmington, last spring, I searched the authorities when I went home with great diligence—many of the instances are but *dictums*, but every where it seems to be held as law, and not to be disputed where the point occurs. It is so held in 4 *Term Rep.* 310—and 306, in the notes. *Wils.* 134, was decided upon that principle, and 1 *Strange* 556. I am very sure that the law is so, but let the case lie over till to-morrow, that *Mr. More* may have time to look into authorities. Judge WILLIAMS assented.

Next morning, the court having looked into authorities, mentioned the case again, and asked the counsel whether they would argue it: and they declining an argument, the court gave judgment for the Defendant.

NOTE.—*Vide Andrews v. Mulford*, and the cases referred to in the note *ante* 311.

The Surviving Partners of Auley McNaughton & Co. v. Blocker's Administrators. Oct. 1796.

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A payment made after the *teste* of the writ, is not good in support of the plea of *plene administravit*. Judgments obtained against an administrator after the *teste* of the writ and before the time of pleading, may be plead at the proper time. Debts assumed by the administrator before the *teste* of the writ, must be allowed him to the amount of his assumptions.

Case upon assumpsit, for goods, wares and merchandize sold and delivered; and the Plaintiffs proved their case sufficiently, and established a demand to the amount of £ 324. The Defendants had pleaded *plene administravit*. They proved effects came to his hands to the amount of £ 1072. The administrator gave in evidence sundry debts paid before the institution of this suit; also divers debts paid after the *teste* of the leading process (which in this case was a *sci. fa.* against the administrator, to make him a party to the suit) and before the plea pleaded. He had also pleaded judgments had against him as administrator, previous to the time of his pleading; and he proved several judgments had against him after the *teste* of the writ, and before he had notice thereof, and before plea pleaded. He also proved assumptions made by himself, to pay several debts of the intestate to a large amount, prior to the *teste* of the writ.

Mr. Moore and *Mr. Hay*, for the Plaintiffs, argued that the common law of England, with respect to executors and administrators, is the law here, unless where it has been altered by acts of the Legislature, passed since the year 1778, where the common law of England was enforced here by act of Assembly; and although the Judges may be inclined to think some part of that law, as it respects executors and administrators, more strict than is perfectly consistent with Equity, yet as they are to expound, not make the law, and as the Legislature have never altered these seemingly exceptionable parts, it is the business and duty of the judiciary to declare it as it really is. Then as to voluntary payments made after the *teste* of the writs, it is a clear position, that they are illegal. When a suit is once instituted, it takes from the administrator the option he before had, of first paying what creditor in equal degree, he thought proper. He can no otherwise prefer a creditor of equal degree, than by confessing a judgment to him time enough to be

Oct. 1796. *pleaded in bar to the former action. The plea of plene administravit does not, as is supposed on the other side, relate to the time it is pleaded, so as that a payment made prior to that time will support it. The form of pleading is one of the best evidences of what the law is; and the uniform tenor of this plea is, that the Defendant hath fully administered; and that at the time of the action brought, or at any time since, there were not in the hands of the administrator, any of the effects of the intestate to be administered. The words at the time of the action brought, or any time afterwards, are so essential, that without them the plea would be vitious. 3 Lev. 28. But a payment after the time, proves there were assets after the teste in the hands of the administrator, and disproves that part of the plea. A bare stating of the essential parts of this plea answers what is insisted on for the Defendant, as to its relation to the time of pleading. It also proves a relation of the plea to the teste of the writ, and that the administration to be good, must have been before not after that time, whether any notice be given to the administrator or not. Notice is no way to be considered—it is not stated in the plea nor need it to be—it is not more hard to compel the administrator to take notice of the commencement of a suit against him, than it is to take notice of judgments obtained against his intestate in his lifetime in every court throughout the country—he is undoubtedly bound to this under the pain of a *devastavit*. It may possibly operate injustice in some cases, to require an administrator to take notice of a suit at the moment of its commencement, and before he has actual notice, under the penalty of a *devastavit*, yet no doubt the rule was originally established upon proper principles, which would shew themselves as soon perhaps in consequence of an infraction of the rule, as by any other means. Many of the old rules of the common law appear useless and unjust to a hasty observer, and sometimes to a critical one; but once broken in upon, are succeeded by such a train of evils, as abundantly demonstrate the wisdom of antiquity in framing them. They ought not to be removed by the violence of any rude hand, nor without great circumspection, and never by the judiciary. As to the evidence of divers debts assumed before the teste of the writ, they were assumed as administrator, whereby is clearly implied, that he is only to be*

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liable in that character; and then he stands precisely in the same situation he did before as to other creditors—a promise to pay the debts as administrator, did not oblige him *in proprio jure*. It is not like the case of a bond given by the administrator to pay the debt of the intestate, and accepted in lieu thereof, by the creditor. Oct. 1796.

Taylor in reply—The law cannot be as stated by the Plaintiff's counsel, that payments made by the administrator after the teste, and before notice of the writ, are not allowable as evidence in support of the plea of *plene administravit*. Common sense and common justice require, that the administrator shall have notice from the creditor of his demand, before he is bound to attend to it, or can commit a *devastavit* or misapplication of the assets by paying other creditors. How can the institution of a suit, where the writ is taken out perhaps in the most secret manner, be calculated to afford this notice to the administrator? Why will the law compel him to take notice of that circumstance? Why require a thing so unreasonable in itself? The argument of the Plaintiff's counsel proceeds upon the form of the plea, but that is not the only form—it is only calculated to fit the case, where in fact a full administration had taken place at the time of the commencement of the suit. But if the case were not so situated, but the administration had taken place after the teste of the writ and before notice, I apprehend the plea might state that fact, and say the writ was taken out on such a day, and that the administrator first had notice thereof on such a day, before which day he had fully administered. The plea in the present case is not drawn out at large, but by agreement between the counsel on either side, is supposed to be drawn out at full length. We may as well suppose the plea of *plene administravit* to be of this latter form, as of that stated by the Plaintiff's counsel. I can see no reason why such a plea should not be good. As to the *assumpsit*, it was made before the teste of the writ. If it give a security for the debt upon the Defendant *in jure proprio*, he ought to be allowed it as a payment as administrator, as much as if it had been a bond, and that undoubtedly would have entitled him to an allowance to the amount of the bond.—*2 Vent.* 358. An *assumpsit* though made as administrator, being made subsequent to the death of the intestate, is not a contract chargeable upon the estate of the de-

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Oct. 1796  ceased. No contracts are chargeable upon that fund, but such as were made by the deceased, except in a few instances, such as funeral expenses and the like, which are necessarily occasioned by the death of the intestate.— Were it allowed to executors or administrators to make contracts chargeable upon the estate of the deceased, no dead man's estate would be safe : besides it will not be denied, that where an executor or administrator undertakes to pay a debt of the deceased, he becomes thereby, absolutely bound to do it. He makes it his own proper debt—no excuse for want of assets or the like will save him. As to the judgments obtained before they pleaded, I will say nothing in respect to them, since the reasoning of the Plaintiff's counsel admits, that a judgment obtained after a suit commenced, but before the Defendant is bound to plead, may be pleaded in bar to the suit, and of course that plea need not relate to the teste of the writ.

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Per curiam—WILLIAMS absent. The plea of fully administered, as to its form, is as stated by the Plaintiff's counsel; and in strictness, a payment made after the teste is not good in support of *plene administravit*. As to judgments obtained after the teste, they may be pleaded by the administrator, if obtained before the plea pleaded at its proper time. As to debts assumed by the administrator before the teste of the writ, such assumption obliges him to pay the debt as effectually as if he had given a bond. He must therefore be allowed to the amount of his assumptions.

NOTE.—The first part of this opinion was incorrect—if in fact the payments were made after the teste, and before notice, that should be stated in the plea; and then the payments before notice may be given in evidence by the administrator *Offi. Exec.* 145. *God. Orp. Leg.* 220. *Plow. Com.* 277.

NOTE.—*Vide* note to *Evans v. Norris's Adm'rs.* ante 411. *Littlejohn v. Underhill's Ex'rs.* 2 *Car. Law Rep.* 574.

Anonymous.

Holmes had obtained a judgment in the County Court, and Butler having stated in an affidavit some causes of complaint against the judgment, had procured a *certiorari* to issue returnable to this term, only two terms having first intervened.

Per curiam—When a *certiorari* issues, the adverse party has notice to appear on the return day of the *certiorari*, and if the writ is not then returned, nor any proceedings

had to continue it in court, it is like other writs discontinued, and a *procedendo* ought to issue. Here is clearly a discontinuance, therefore let a discontinuance be entered, and a *procedendo* issue to the court below. Oct. 1796.

**Kiddie, Surviving Partner of Ramsay & Kiddie, v.
Gabriel Debrutz.**

A confession in an answer to a bill in Equity, may be given in evidence against the Defendant, in an action by a third person. The giving of a note is no extinguishment of the prior cause of action; and where there is a count upon a note, as well as the general counts, a recovery may be had upon the general counts, although the note is alleged to be lost.

This was an action upon the case, and the declaration contained a count upon a note of hand, a count for money lent, for work and labor done, and the other usual counts. Upon the trial, the Plaintiff's counsel could not produce the note, they alleged it was lost: but they produced an answer in Equity of the Defendant, to a bill brought against him by a third person, in which answer, he stated a schedule of debts owing to him, and amongst others, he stated a debt of £90 due to the Plaintiff. *Mr. Spiller* objected, that this bill and answer, being a suit between other parties, and in which the Plaintiffs were no way concerned, the answer could not be read as evidence—it was evidence only between those who were parties to the suit in Equity.

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Per curiam—Where a verdict is given in evidence, it is to the end that conclusions drawn by a former jury between the same parties, upon the same points, may have some weight with the present jury; and as it is a conclusion upon evidence subject to the cross-examination and contestation of the party against whom it is produced, it is allowed to be given in evidence against him—but a verdict between other parties cannot be given in evidence. However, the confessions of a Defendant, tho' made in private conversation, and to persons no ways concerned in interest, may be given in evidence, and that is the principle the court goes upon with respect to a confession in an answer. It is equally proper to receive evidence of a confession contained in an answer made upon oath, as it is to receive evidence of a confession made in a less solemn manner. The evidence was received.

Mr. Williams, for the Defendant, then objected, that there was no evidence to support the general counts; and

Oct. 1796. if there were, yet it having been proved that a note of hand was given, and is now lost, there could be no recovery on the general counts, for that note was a negotiable instrument, and may now be in the hands of some indorsee or holder, who may hereafter resort to the Defendant, and will be entitled to recover notwithstanding the judgment the court may now give. The holder will not be subject to any transactions which may take place between the original parties to the note. It is true, a Court of Equity, in a case thus circumstanced, would make a decree, but it would do so upon terms—it would require the Plaintiff to give security that the note should not afterwards be demanded of the Defendant, or if demanded that he should be indemnified therefrom. This court cannot impose any such terms—they must give an absolute unconditional judgment, if any. A note of hand may be given in evidence to support a count for money lent, but the proposition will not hold *e converso*—proof of service done, will not maintain a count upon a note. The note in the present case cannot be produced to support that count. Were it produced here, and filed amongst the court papers, there would be no danger of its rising up hereafter to charge the Defendant; and although, had there been no count upon a note, nor any evidence of a note, the confession contained in the answer might have been competent to the proof of the count for work and labor done; yet when the evidence shews a note, it hinders a recovery upon this count also. My objection is, that whilst the note exists, there can be no recovery upon the consideration for which it was given, or the cause of it, lest the Defendant might be twice charged.

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Duffy, e contra—The giving of a note is no extinguishment of the prior cause of action, as a bond or other instrument under seal is. 1 Burr. 352. He said he was unprepared with authorities, not having expected the objection; but if the court would direct a verdict for the Plaintiff, subject to their opinion as to the matter of law, he would produce authorities some time in this term.—This was assented to, and the verdict taken accordingly. And the court having taken time to consider the case, and having seen the authorities produced by Mr. Duffy, viz. *Ld. Ray* 1427, and 12 *Mod* 309, gave judgment for the Plaintiff—the Defendant's counsel declining any further argument against these authorities.

NOTE.—*Vide 3d Am. Edit. of 1st Phil. on Evid. 286, as to confessions in an answer to a bill in Equity. The last point in this case is fully supported by 2 Phil. on Evid. 11, (2d Am. Edit.)* Oct. 1796.

Anonymous.

The Plaintiff in this case had obtained judgment against the Sheriff in an action in Ejectment in the County of Cumberland, and there was no coroner in the County to whom process could be directed. Mr. Moore, for the Plaintiff, moved that process of execution should be directed to the Sheriff of Moore County, and read the act of 1779, c. 5, s. 3, and upon hearing this act, the court ordered a writ of possession to issue, directed to the Sheriff of Moore County accordingly.

NOTE.—*Vide act of 1821, c. 3, which makes ample provision for the execution of process by the Sheriff of an adjoining county, in all cases where there is no Sheriff or coroner, or where they are disqualified from acting.*

Evans v. Kennedy.

The action of trespass and false imprisonment is the usual and proper remedy for one who is held in bondage, to try his right of freedom. When the Plaintiff in an action of this kind is not ready, and obtains a continuance, the Defendant must give bond and sureties, for the Plaintiff's appearance at the next term, and, in the mean time, to treat him with humanity: and, by HAYWOOD, Judge, also to allow Plaintiff time to procure evidence: but WILLIAMS, Judge, thought otherwise.

The Plaintiff was a person of colour, who claimed his freedom, and was detained in slavery by the Defendant. The Plaintiff and Defendant had agreed that an action should be instituted without process, and an issue made up to try the fact; and some doubt now arising in regard to the proper form of action, and of the issue to be made up, they referred it to the court to direct the proper form of action and issue.

Et per curiam—WILLIAMS & HAYWOOD, Judges.—The action used on such occasions for eight or ten years past, is the action of trespass and false imprisonment; to which the Defendant pleaded that the Plaintiff is a slave, and cannot maintain an action; and to this, the Plaintiff replies, he is not a slave; and an issue is made up upon this point and tried by a jury. The issue was then made up in the present case accordingly, and the evidence not being competent to prove the Plaintiff's freedom, the (423)

Oct. 1796. court recommended the withdrawing a juror, which was agreed to ; and then the Plaintiff's counsel moved, that Defendant might give bond and sureties to permit the Plaintiff to appear at next term, and to treat him with humanity in the mean time.

Et per curiam—This has often been ordered before on similar occasions, and is the usual practice where the trial is delayed till a succeeding term—and it was so ordered accordingly in the present case.

Judge HAYWOOD—I think the bond usually given goeth further—to allow the Plaintiff time to collect evidence and procure depositions, if necessary. Judge WILLIAMS—I do not recollect the Defendant was ever bound to that : it would produce a loss of the Plaintiff's service, which in the event of a verdict against him, the owner could not be compensated for. So the bond was ordered to be taken as above.

NOTE.—*Vide Gober v. Gober*, 2 Hay. 127. *Parker v. ———* *Ib.* 345. Negroes are presumed to be slaves till the contrary appears ; not so of persons of mixed blood. *Gober v. Gober*, 2 Hay. 170. *Scott v. Williams*, 1 Dev. Rep. 376. This last case also decides that, under particular circumstances, substantial damages may be given in actions of this nature.

Surviving Partners of Auley McNaughton & Co. v. Lester.

The Plaintiff produced a notice of taking a deposition, purporting that the deposition would be taken on a certain day in Housertown, before Justices, naming them. The caption of the deposition expressed that it was taken on that day at Housertown.

Per curiam—The deposition cannot be read. The house where it is to be taken must be specified in the notice, not the town only ; for then the deposition may be taken at a place in the town, of which the adverse party may know nothing, and thus be deprived of the benefit of cross-examination.

Cox v. Jackson.

A person who has a chattel in possession belonging to another, and exchanges it for another article, acquires no property in the article taken in exchange, if the real owner thinks proper to approve of the transaction. Where the possession of a chattel does not follow the conveyance, it is a strong circumstance to show fraud, though it may be explained or rebutted.

Trespass to recover the value of a horse sold by the Defendant, a Constable, to satisfy an execution delivered

to him at the suit of *Williams v. John Cox*, the brother of the Plaintiff, upon which he took the horse in question as the property of *John*. The Plaintiff alleges the horse was his. The evidence proved *John* to have been very much indebted to sundry persons—that he had a horse and some other trifling articles—that *Collins* had a judgment against him, and took out execution and put it into the hands of an officer; that other officers who had executions found it, and levied the execution on the horse and other articles, and sold the smaller articles, and did not sell the horse for some time, leaving him in the possession of *John Cox*, until it began to be rumored that the execution was fraudulent; when *Collins* ordered the officer to sell, who sold accordingly, and *George Cox*, the brother of *John*, as the agent of *Collins*, became the purchaser, and left the horse in the possession of *John* for some time, and until the Defendant levied *Williams'* execution on him, and appointed a day of sale; on which day, *Collins* appeared and proved the sale and purchase as above, and had the horse delivered to him; and the next morning, sold him to *George Cox*, without receiving any money, but only taking his note; part of which *Collins* said was paid after the trial of this cause in the County Court, about 18 months after the date of the note, by discounting a debt with a creditor of his—the residue he said was retained in the hands of *George Cox*, to satisfy a debt of *Collins* due to another creditor, which debt however has not yet been paid. A short time after *George* purchased the horse, he was again in the possession of *John*, and continued in his possession till he exchanged him as his own for another horse with a stranger, receiving some money, as the difference of value. Soon after the exchange, he brought the horse received from the stranger, to *George*, who approved of the exchange and lent the horse to *John*; in whose possession he continued for some months, and until the Defendant seized and sold him to satisfy *Williams'* execution. It was proven, that *George* had ridden this latter horse once or twice after the exchange took place.

Mr. Williams—Before *Mr. Taylor* proceeds to make his remarks upon this case, it will be proper for me to apprise him of the grounds of our defence. We rely principally upon this, that the transaction between *Collins* and *George* and *John Cox*, was fraudulent and calculated to protect the horse against the claim of other cre-

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Oct. 1796.  ditors, and therefore void. And for the purpose of ascertaining what are the marks of a fraudulent transaction, we shall rely upon *Twigne's* case, 3 *Co. Rep.* 81—being a construction upon the act of 13 *Eliz. ch. 5*, from which our own act of 1715, *ch. 38, sec. 8*, is taken.

(425) *Taylor*—The case cited by *Mr. Williams* is certainly sound law, but it can never be made to bear upon a case circumstanced as the present one is. None of the marks of fraud laid down in *Twigne's* case, are found in that now before the court. The sale and purchase by *Collins* were not made pending any suit by another creditor with a design to defeat his suit. The property when purchased was not put into the possession of *John* by *Collins*, or with his consent. There is no trust between them, and these transactions were not done in secret; but here was an open levying of execution, advertising it for sale, and an open purchase publicly made by the highest bidder. One of the most prominent features of fraud, is its being done in secret; here nothing like secrecy is attempted. After the purchase of *Collins*, *John* indeed had possession again; and possession of the former owner, after a sale made by him, is mentioned in *Twigne's* case as a mark of fraud; but every mark of fraud may be explained by circumstances, and overturned where the circumstances prove that no fraud was intended. In our case, the horse was not left with *John Cox* by *Collins's* consent, but after he understood the horse had been left in his possession, he then agreed *John Cox* should keep him for some short time, that he might procure the money in the mean time, if he could, and redeem the horse. The money was what he was chiefly anxious to obtain. This shews he was not in *John's* possession for the purpose of defrauding creditors—it shews the purchase was not made to vest the legal property in the purchaser with a view of securing the use to the former owner. It is not every possession of the former owner after a sale, that will make it fraudulent; but only such a possession as is incapable of a fair explanation, and shews that the benefit of the property was intended for the former owner. Notwithstanding the sale, if the retaining of possession by *John*, is explained by the evidence to have been for no fraudulent purpose, then this case has not one mark of fraud mentioned in the case cited by *Mr. Williams*.

Williams for the Defendant—Where a transaction is secret between a creditor and his debtor, for vesting the property of the latter in the former, to the defeating of other creditors, it is surely a mark of fraud as *Mr. Taylor* has admitted; but this though it is one feature of a fraudulent transaction, is not the only one—a transaction may be fraudulent though done in the most public manner. I take this to be one of the definitions of fraud—where a creditor forms a scheme with his debtor to become the ostensible purchaser of his property, and to allow him the benefit of it in such a manner that other creditors cannot resort to it for the satisfaction of their debts, whether the means made use of for these purposes were secret or public, or whether the creditor receives an apparent transfer of the property for his debt to the exclusion of other creditors, when in reality, the beneficial interest is not vested in him, but remains with the debtor. (426)

A creditor's debt, although it be a just one, and the property received in satisfaction of it, be of no more value than the debt, yet if it be received not for the real and true purpose of satisfying his debt, but for the purpose of putting the property out of the reach of other creditors, it is not a *bona fide* transaction, not what it purports to be—in appearance it is one thing, in reality another; and the true enquiry always is, if the transaction is in reality, what it purports to be or not. The true answer is to be collected, not from positive evidence only, for that is seldom to be had in cases of fraud, but from a careful attention to and comparison of circumstances: and every transaction, whether secret or public, by way of voluntary sale and purchase, or by way of judgment, execution and sale made publicly, when attended by circumstances sufficiently indicative of fraud, may be rendered void by them. No possible form or legal ceremony is exempt from scrutiny when suspected of fraud, nor from being made void by it. The law has been so enlarged from time to time, for the purpose of detecting and obviating fraud in all shapes, that it is now competent to produce the effect of rendering void any transactions with which fraud is mingled. The Legislature at a very early period, were obliged to fix their attention upon the inventions of men in involved circumstances. Conveyances of estates, in trust for the grantor, first called their attention, and they applied a remedy by the 50th *Edw. 3.* 3

Oct. 1796 *Reev.* 401. After this, though no trust was expressed, the grantor took the profits notwithstanding the conveyance—this also was remedied. 3 *Reeves* 176, 174, 173. 2 *Rd.* 2. Debtors betook themselves to privileged places, by the superstition of the times they could not be taken from thence—this also was remedied. 2 *Rd.* 2. *St.* 2 c. 3. Then came the 3d *H.* 7. c. 4. making all gifts in trust for the donor, void. 4 *Reeves* 140, 141. Then the 13th *El.* c. 5. intended to overturn every possible case of fraud; and lastly our own act of 1715. c. 38. So solicitous have different Legislatures been to suppress fraud in whatever shape it may endeavor to conceal itself. The endeavors of the Legislature have been seconded by the courts of justice in interpreting these several acts. The rule of interpretation has always been, to give the most extensive operation to these acts in suppression of fraud; so that at this day, although a conveyance may purport to be absolute, yet if any circumstance attends it from whence a jury may reasonably believe it to be fraudulent, it is void. Thus if a man conveys by feoffment, and still takes the profits, the law deems it a mark of fraud—the conveyance is not what it purports to be, and is void if the jury will find it fraudulent. 3 *Bac. Ab.* 603, 604. If a man indebted, conveys all his property to one of his creditors, and yet continues in possession and uses it as his own, it is fraudulent. 3 *Re.* 81. If the debtor has goods to the value of twenty pounds, and five several creditors to the value of twenty pounds each, and he conveys to the first creditor his effects, upon a secret trust that the creditor will deal favorably with him, and let him have the use of the goods or some part thereof, it is fraudulent; or where the seller continues in possession notwithstanding the sale. *Pre. Ch.* 285. Or where the debtor conveys all his estate without exception of any part, the generality of the conveyance induces suspicion, and is evidence of fraud. 2 *Bac. Ab.* 604, 605. Or if the seller continues in possession, and is to account annually. 2 *Bac. Ab.* 608. Or where, though a valuable consideration be given, the conveyance is not *bona fide*, but with a view to defeat some creditor or purchaser. *Cowp.* 433, 434. Or where a man being sued and issue joined, before trial, conveys to a third person to the use of his son, with a proviso to be void upon tender of a small sum by the grantor, who still continues to take the profits. 3 *Dyer* 294. Or where a principal grants to his surety, before the surety is dam-

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aged, to the prejudice of another person. 3 *Dyer* 295.— Oct. 1796.
 Or where a creditor has his execution levied, and orders the sale to be delayed to the prejudice of other creditors. 1 *Wils.* 44. Or where a landlord distrains the father's goods and sells them, and the son purchases, and the father continues in possession. *Pre. Ch.* 233. All these and the like circumstances, are the *indicia* of fraud; and none of them stronger than that of the former owner still continuing the possession after a sale.

In the present case, *John Cox*, the debtor, was continued in possession after a seizure by the Constable, until it became necessary to sell, to suppress the clamor of the neighborhood. After the sale, his brother was made the agent of the creditor, and he is still continued in possession, until the execution of another creditor is levied. Then the former purchaser interposes his claim, and sells to the brother, for which he has never received any thing, and immediately afterwards, *John Cox* is in possession again, exchanges the horse as his own, receives money as the difference of value, which he never accounted for, nor has ever since been required to account for—so that from the time of the levying on this horse, to the time of the sale to satisfy the last execution, the debtor has continued possession all but a few days, during which it was thought proper the brother should keep him, till the suspicions and clamors of the neighborhood had subsided. These circumstances appear to me to be completely adequate to the proof of fraud between these persons. They shew the property was not intended to pass into the creditor for his own benefit, but that the use was to be for the debtor, to the exclusion of the claims of other creditors. But say that these circumstances are not sufficient, there is still another which shews the right the Constable had to seize and sell the horse gotten in exchange. *John* exchanged the first mentioned horse as his own, and received the other as his own; he did not act as the agent of his brother; the property therefore, of the latter horse vested in him, however he might be liable to his brother's action for disposing of the other; and then the property thus acquired, was clearly liable to *Williams'* execution then in the hands of the officer. It issued the 29th September, 1792, and the exchange took place afterwards, whilst the execution was in the hands of the officer. The law is clear, that goods are bound from the teste of the

Oct. 1796. execution; and that the execution will so attach upon them as to disable the debtor from selling them afterwards—they will lie, liable to be seized in the hands of a vendee. *Esp.* 392. 1 *Mo.* 188. *Cro. Eliz.* 174, 440.—In which latter case, the goods were sold the same day the writ of execution bore teste; and though in general, there is no *prius* or *posterius* in the same day, yet in suppression of fraud, the execution was construed to have issued before the sale, and so the sale was void—therefore in the present case, as the execution attached upon the horse the instant he became the property of the debtor, the officer was well justified in selling him.

Per curiam—The goods are bound from the teste of the writ of execution, but that rule will not apply to the present case—*John* acted as the agent of his brother, who having approved of what he did, ratified the transaction *ab initio*—so that the property of the latter horse passed to *George Cox*, and not to *John*, if the first horse really was *George's*—as to that the court differed.

(429) Judge WILLIAMS.—The circumstances do not amount to proof of fraud—the possession which *John* had after the purchase by his brother, is not to be taken into consideration, the brother having a right to indulge him with the use of his property as he thought proper. As to the possession he had after the seizure by the constable, and before the sale, that was by the consent of the constable, who was answerable if the property was not afterwards forthcoming. It is the usual practice with officers in this country, who seldom remove the property before the day of sale, unless where they suspect the Defendant will remove out of the way. As to the possession he had after the purchase by *Collins's* agent, that was without the privity of *Collins*—no part of his possession appears to have been continued by the consent of the creditor, and in that particular differs widely from the possession mentioned in *Twigne's* case, and the other subsequent cases grounded upon it.

Judge HAYWOOD.—All the circumstances subsequent to the sale, are to be taken into consideration as explanatory of the real state of the precedent transactions—the possession of *John* always continued—*George* gave nothing for the horse, though a valuable consideration was pretended and held up. The debtor having used the horse

as his own, and disposed of him, are visible marks of fraud. The jury found for the Plaintiff. Oct. 1796.

NOTE.—Upon the question of fraud, see *Hodges v. Blount*, and the note thereto, *ante* 414.

State v. Norris.

A motion to postpone a trial for murder, on account of the great public excitement against the prisoner, was refused. WILLIAMS and HAYWOOD, Judges, differed as to the question, whether a juror could be asked on oath, whether he had expressed an opinion unfavorably to the prisoner. The State may discredit its own witness by proving that the witness, on former occasions, had given a different account of the transaction, from that which he relates in court. A person who was violently abused and beaten, made his escape, ran to his own house, eighty yards off, got a knife, ran back, and upon meeting with the deceased, stabbed him. It seems, that he is only guilty of manslaughter. If, upon the second meeting, the prisoner had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, the killing would have been murder.

Indictment for the murder of *Nathaniel Daves*, and not guilty pleaded.

The prisoner was brought to the bar to take his trial. Mr. Hay read a paragraph from a paper printed in this place, and circulated on Monday last, stating the homicide committed by the prisoner in terms of aggravation—and moved on that account for a postponement of his trial, apprehending that the public mind was too much irritated at present, for the prisoner to have a fair trial.

Judge WILLIAMS.—The people in this country do not take for truth, every thing that is published in a newspaper. The jury well know they are to be governed only by the evidence and the law. I trust no one will be so much prejudiced against the prisoner, as to be led to an unjust condemnation. It will be the duty and the business of the court, to see that he has every advantage the law allows him. It is not to be apprehended that a jury of this country will do him wrong—their humanity is proverbial.

Judge HAYWOOD.—I disapprove highly of the publication—the cause, however, is in course for trial, and must come on. The clerk began to call over the jurors, after informing the prisoner these were the men who were to pass upon his trial, and that he must challenge them if he thought proper, as they came to the book to be sworn. Mr. Hay said the killing of *Daves* by the prisoner, had been a subject of very general conversation; that the

Oct. 1796. fact had been related in a newspaper under aggravating circumstances, and though that publication might not have been made with a view of pre-occupying the mind of any one who was to take a part in the trial, yet in reality, it may have had the effect of prejudicing the public mind in general against the prisoner: that he had but too much reason to apprehend it had produced such effects: he therefore moved when the prisoner objected to a juror *propter effectum*, or for favor, as it is called, that the juror might be examined upon oath whether he had expressed an opinion unfavorable to the prisoner, as otherwise it would be difficult for him to produce any satisfactory proof of the fact, having been confined and visited only by one friend, and not knowing until the moment the juror is offered, whether or not that person would be upon the panel. Great part of the jurors being talesmen, summoned this morning since the sitting of the court, had he ever heard of any man having expressed an unfavorable opinion, not knowing he would be summoned as a talesman, it is not to be expected the prisoner could be prepared to prove his exception, however true it might be, unless it could be supposed he had prepared himself to support his exception against every man who had given such opinion, and that would be unreasonable. *Mr. Jones* opposed the motion, saying there was no precedent for such a procedure, and he hoped the court would not now make one for the first time in favor of this prisoner, who should be tried as all other prisoners have been.

Judge HAYWOOD—I do not at present recollect, ever to have seen such a practice, and I am induced to think there is no precedent of this kind. Judge WILLIAMS—there is none.

Mr. Taylor then cited 3 *Bl. Com.* 363. A person about to be sworn as a juror, may be challenged for any of the causes there stated; or even where the challenger hath no principal cause of challenge, but only some cause of suspicion, the validity of which must be left to triers. He also cited 3 *Bl. Com.* 364, where it is laid down from *Co. Litt.* 158 *b.* that a juror may himself be examined on oath of *voire dire*, with regard to such causes of challenge, as are not to his dishonor or discredit. He also cited 4 *Bl. Com.* 352, where it is said, the prisoner may have the same challenges for cause, in a criminal, as the Plaintiff or Defendant may in a civil case, and where a challenge *propter affectum*, is mentioned as one of them. He

argued, that the expressing an opinion by the person offered as a juror, if not a principal cause of challenge, as he thought it was, at least is such a cause as might reasonably induce a suspicion of his not being indifferent and impartial towards the prisoner; and if a prisoner in a criminal case had a right to except to a juror, suspecting him to be unfavorable, there must be some mode of trying and discovering the truth of the exception, and there was no reason in a criminal case for resorting to a different mode of trial from that used in a civil one; and if on a civil case, for the purpose of reaching the disposition of the juror towards the party, the law would suffer a juror to be interrogated on his oath, with respect to the truth of the cause alleged, to shew him not impartial, it is equally necessary that a prisoner, where life is in danger, and for whom the law professes so much tenderness, should be also entitled to have his exception tried in the same way, and to the same means of investigating it. One of those means is undoubtedly the oath of the juror himself; and why shall not a prisoner have the oath of a juror, as well as a Plaintiff or Defendant who has only some trifling property perhaps in question? No inconvenience is brought upon the juror by the question to be asked, more than in a civil case: he will not be required to give an answer to any question tending to criminate or defame himself. It is a very easy task for him to say whether he has delivered an opinion upon the case of the prisoner or not. Is there any man here, who were he in the situation of the prisoner, would not be disconcerted to be tried by persons he suspected had already condemned him? The motion of *Mr. Hay* cannot be an improper one, or the law cannot be said to have that compassion and humanity for prisoners, which it so much boasts of. It is of very little consequence, whether or not the practice of our courts, hath been known to conform to what is now asked for by the prisoner; few cases perhaps have been known to require the same caution, and for that reason, it may not have been taken. The question is, does the law allow the prisoner such an objection, or such a means of discovering its truth or falsehood? I think it does allow of both, and must insist on them for the prisoner.

Judge HAYWOOD.—Upon reflection, I am of opinion (432)
the motion is proper, and the person offered may legally
be interrogated on oath, as to any unfavorable opinion .

Oct. 1796. he has expressed against the prisoner. I can see no reason why the exception is not allowable as well in a criminal as in a civil case, nor why the juror should be sworn in a civil case and not in a criminal one. It is rather more necessary in the latter, as it is of more importance to the prisoner concerned to have a good opinion of his jury. If a prisoner is at all entitled to the privilege contended for, it is as necessary to allow it in the case before us as in any other. There is reason to suspect that the publication just spoken of, may have had some influence upon the public mind, unfavorable to the prisoner. The homicide with which he is charged, has taken place in this town but a few days past. It is to be feared some ferments are caused by it, rendering it proper for the court to be circumspect and careful that the prisoner be not prejudiced by the violence of the current opinion. We should act as counsel for the prisoner so far as to see that he has a fair trial, and that he is not denied the benefits the law has provided for his defence against injustice.

Judge WILLIAMS.—I cannot think the prisoner is entitled to interrogate a juror on oath as asked for. This man should be tried as all others have been. Why should we extend privileges to him, that were not granted to the man tried yesterday for murder? That man's life was as dear to the public yesterday, as this man's is to-day, and we allowed no such privilege to him. I have never known such a thing even asked for before in any criminal case. The office of a Judge is indeed a very arduous one—I feel sensibly how disagreeable it is to sit upon a trial when the life of a fellow citizen is in jeopardy; but when we once undertake it, we should discharge it faithfully, regardless of those sympathising feelings for the prisoner, which are so apt to be experienced on such occasions.—We are not to be influenced in any respect by them. It is not a true position that we are to be the friends of the prisoner—we are to see that he has a fair trial, and this is all that is required of us.

Judge HAYWOOD—I am intrusted in some measure by my country with this man's life—he may be a bad man and deserve death; but I will not prejudge him, neither will I for any earthly cause be prevailed upon to deny him any privilege he is entitled to. I think upon consideration he is entitled to that which his counsel ask for

him ; and were the whole world here present to demand his execution, I would not refuse him an advantage that should be conceded to him; whilst I sit here, the public cry shall never seduce or impel me into the adoption of a measure my judgment disapproves. Oct. 1796.
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Mr. Hay—In order to get over the embarrassment this motion is likely to produce, and the warmth it has given occasion to, I propose, that where a juror is challenged *propter affectum*, or for having expressed his opinion, his name shall be set down and noted as one challenged for cause, and that the clerk then proceed with the panel ; and if the panel shall be gone through, and the jury not completed, that then, we consider of the jurors whose names are noted, and how the exception shall be tried.— Perhaps we may get a jury before the panel is gone thro' and then it will not be necessary to consider further of the exceptions.

Judge WILLIAMS—That proposal is a proper one—I think it should be adopted. Judge HAYWOOD assented.

The Jurors in the panel were then offered to the prisoner, and a jury was completed ; and they were sworn and charged with the prisoner.

The evidence on the trial was as follows : On Saturday night, *Norris* and *Young* came to the house of *Mrs. Ramsay*, where were *Daves*, *Dudley*, *Ramsay*, *Campbell* and others. *Young* remained in the piazza, *Norris* came in and sat talking with *Ramsay* for some time. *Campbell* went into the piazza to *Young* who was intoxicated. He talked of *Daves*, saying he understood *Daves* had said he could whip *Norris*, and desired *Campbell* to tell him to come out. Shortly after this, *Norris* came out. They moved towards the door ; *Campbell* went in leaving *Young* and *Norris* in the piazza, and told *Daves* to come out.— *Daves* and *Dudley* pulled off their clothes and went into the piazza, *Young* and *Norris* had gone off. *Dudley* and *Daves* went into the street, and *Norris* came walking from the upper part of the town, down towards his own house, passing that of *Mrs. Ramsay*. *Daves* and *Dudley* went towards him and met him, and *Dudley* said to him, you came here to breed a quarrel. *Norris* answered he had not. *Daves* replied, you did. *Norris* answered, he did not. *Daves* said, you are a damned liar. *Norris* replied, whoever says I came here to breed a riot, is a

Oct. 1796 *damned liar. Said Daves, you are a damned liar, and tripped up his heels and threw him on the ground. Norris rose and stepped towards him. Daves struck him.— Norris desired Campbell to take notice of that. Dudley said to Daves, he will make you pay for that, take satisfaction. (434) Daves stepped to him and gave him three or four blows, upon which Norris ran off towards his own house. Daves and Dudley walked down the street calling for Young, who met them with his coat off. They demanded of him if he meant fighting, and why he had stripped; he answered that he was not for fighting, and that he had stripped to see fair play, hearing the attack upon Norris. At this time, the witness heard Norris say, damn you, you struck me, did you? Come on, I am now ready for you. Daves said, you have a stick or some weapon you want to kill me with, and stepped towards him, and he then cried out, I am stabbed. The witness ran to the place where he was, and he was stabbed on the left side of the belly, with a wound three or four inches in length. Upon the cross-examination of the witness, he said Daves kicked at Norris after he fell in the first combat, near Mrs. Ramsay's; and that Norris's house was about fifty yards from the place where Daves was stabbed; that he had gone some distance below Mrs. Ramsay's towards Norris's, before they met the second time; and that Norris was gone three or four minutes before he returned; and that the fighting happened about an hour in the night. This was Campbell's testimony.*

The evidence of Young was, that he met Norris at the race-ground on Saturday, and rebuked him for quarrelling the night before with Daves. Norris answered, it is all settled, we drank together at the path—it was occasioned by liquor. At night we came down by Mrs. Ramsay's, he asked me to go in, but I declined: he desired me to wait a little for him—I waited in the piazza—Campbell came into the piazza—I walked down the street, and got just below Mrs. Thompson's, where I saw Mrs. Thompson standing; Dudley came out hallowing for me, I answered him and pulled off my coat, he came up and caught me by the shoulder, and asked if I had come to breed a riot—to which I answered, I had not.—Daves also came up, and immediately afterwards I heard him cry out, he was stabbed, and turning that way I saw Norris run off. I think it was eighty yards from the place where Dudley and Daves came up to me, and where

Daves was stabbed, to *Norris's* house. *Dudley* hallowed Oct. 1796.
 so loud for me, that I think he might have been heard to
Norris's house. A physician who attended *Daves*, swore
 he died of the wounds he received that night.

Dudley deposed, that on Friday, himself, *Daves* and
Norris came together into town from the race-ground—
 that they stopped by the way at a house in town, and were
 drinking together. A conversation arose about one
McRae. *Daves* abused, and *Norris* spoke well of him. (435)
 Some warm words passed. *Daves* pulled off his clothes,
 and went down stairs, bidding *Norris* to follow. *Norris*
 remained where he was, and *Daves* came in asking *Nor-*
ris why he had not followed him. *Norris* answered, that is
 not the way I mean to fight—I will burn powder with
 you. We all went home, and next morning I met *Nor-*
ris, who asked what had been the matter last night,
 saying he had come to see about it, and seeming to be
 uneasy at what had happened. He inquired for *Daves*,
 who about that time came up. They conversed together;
Daves said, it was your fault, but I don't care—I never
 bear malice. *Norris* replied, it was not me but rum; let
 us go to *Dick's* and drink something. I proposed they
 should meet at the races and drink together, which they
 agreed to. At the race-ground he called to *Daves* and
 myself to come and drink with him, and we did so.—
 After drinking together we parted. After dark, at
Ramsay's, *Norris* came in and sat down. We sat
 down to supper, and *Norris* was asked to sit down,
 but declined and went out—*Campbell* was missing—but
 after supper came in—*Daves* asked him what *Norris*
 came for; *Campbell* said, he supposed to breed a riot.—
Daves and myself then pulled off our cloaths and went
 into the piazza. *Norris* and *Young* were not there.—
Daves called out for them, saying they were cowards —
Norris came up, and *Daves* met him. I went off calling
 for *Young*, he answered, I am here. *Daves* and *Norris*
 had some words, and *Daves* tripped him up. *Norris*
 rose and *Daves* struck him. *Norris* required *Campbell*
 to take notice. It was just at this time I heard *Young*
 answer. *Daves* struck three or four more blows, and
Norris ran off. We went to *Young* and stood talking
 with him, when *Norris* came up. *Daves* turned and went
 towards him, saying, you have got a weapon or a stick,
 which *Norris* denied. *Mrs. Thompson* called out, saying,
Norris has a sword or gun, he will kill you—do not go

Oct. 1796. to him. *Daves* however, and *Norris* met in the street opposite to where we were. As they met, *Norris* made a lunge. *Daves* cried out, he has stabbed me, and fell. *Young* and myself went to him—his bowels were out—we carried him to *Mrs. Ramsay's*, and in two hours he died. At the last meeting, I did not see *Daves* strike before the stab. It was eighty or an hundred yards from *Thompson's* the place where the stab was given, to *Norris's* house. It is about twenty yards from *Mrs. Ramsay's*, where the first combat was, to *Thompson's*. When *Norris* returned, he came running, and immediately after he gave the stab, ran off. I followed him, but did not overtake him, and returned. When *Norris* came into the house at *Mrs. Ramsay's*, *Daves* said to me, *Mrs. Ramsay* does not want *Norris* here, you had better ask him to go out. I replied, no—he will go presently.

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Mrs. Thompson deposed as follows: that on Saturday night she was sitting in an out-house, and heard a great noise, and a woman's voice, and saw *Mrs. Ramsay* in the street, and heard very heavy blows, and *Mrs. Ramsay* saying, cousin *Ramsay* don't strike too. Just at this time *Young* came to her where she was standing in the street; she asked who were making that noise, he answered that *Dudley* and *Daves* were beating *Norris*; requested her to take his coat, saying he could not stand that, alluding as she supposed, to the heavy blows that were heard. Immediately a man came running, *Young* asked who he was; he said, *Norris*: what is the matter, said *Young*, don't run. *Norris* replied, I can't stand three or four men. *Young* said, you must stand; it is cowardly to run. I will stand by you. *Dudley* & *Daves* came running up, and *Norris* breaking the hold *Young* had on him, ran off. *Young* stepped back, saying to *Daves* and *Dudley*, stop. They asked him whether *Norris* had come by, he said yes—but what is the matter?—They said, do you stop us? do you want to fight? He answered no. *Daves* then came to where she was, and said *Norris* had abused *Mrs. Ramsay* unmercifully, and that he had resented it. At this time *Dudley* and *Young* were in the street in high words, and *Norris* came back running. *Dudley* and *Young* stood some small distance from her and *Daves*. *Norris* stopt on the other side of the street and stood a short time. She said to *Daves*, do not go to him; perhaps he has a weapon. *Daves* replied,

damn him ; I am not afraid of him, weapon or no weapon; and went round the others from her, towards *Norris*; and said to *Norris*, have you a weapon? he answered no. Have you a club? he answered no. Then said *Daves*, do you think you can stand a man now? If I can't, said *Norris*, I have a man that can. *Norris* then cried out, stand off *Mr. Daves*, or the worst is yours. She then heard two or three blows, and *Daves* cried out, I am stabbed. *Norris* retired a small distance and stood.— She saw him no more afterwards, that night. When *Norris* returned, he did not advance upon *Daves*, but ordered *Daves*, when he advanced, to stand back. Two or three blows passed before the stab, and she thinks from the manner of *Daves's* advancing they were given by him—he went towards *Norris* as if going to attack him.— (437) She heard the blows that first passed near *Mrs. Ramsay's*—they were very heavy.

Several other witnesses were sworn, but they related nothing material. *Mr. Briggs* said, on Saturday, the day preceding the night when *Daves* was stabbed, he told him he expected he would have to fight that night, but did not say whom. *Mr. Dick*, recited the quarrel between *Daves* and *Norris* on Friday: at which time *Dudley* said to *Daves*, say what you please to him, if you can't flog him, I can. An old lady swore *Daves* had obtained a judgment on a warrant against some man, and about three weeks before his death left it with her, telling her to keep it, and if any accident happened to him, and he should die, that she might collect the money—and a day or two after his death *Dudley* came for it. Another witness said, the day before yesterday *Dudley* was speaking, after coming from court of a trial for murder which had taken place that day, and of the acquittal of the prisoner, and said upon that occasion, I will bet an hundred pounds *Norris* will not be acquitted—if he should, the man who clears him ought to be put in his place. Another witness said, there were broils between *Norris* and the family of *Dudley*, but none that he knew of between *Dudley* and *Norris*.

Jones, the Solicitor General, then moved to have leave to introduce witnesses to prove a variance between what *Mrs. Thompson*, one of the witnesses, had sworn in court and what she had related in several conversations to others. He admitted the rule in civil cases was, that the

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Hay and Taylor objected to the attempt of the Solicitor-General to discredit his own witness—they insisted the rule of not allowing this to be done in civil cases, was equally applicable to criminal ones.

Per curiam—The rule is so in civil cases—let authorities be produced to show how it is in criminal ones.—The gentlemen on both sides searched for authorities, but could find none. Judge WILLIAMS—I think the Solicitor should be allowed to discredit the witness, if she has varied from the relation she now gives. Were he not allowed to do this, a prisoner and his friend, might tamper with worthless persons to swear for the prisoner, and secure them from any impeachment of their credibility, by procuring them to relate in public, a story tending to establish the guilt of the prisoner, and by that means cause them to be summoned by the public officer and introduced for the State; and when sworn, to depose directly against what they had publicly related. Were not the Solicitor allowed to impeach such evidence, a wide door would be opened for the acquittal of the prisoner by false testimony—the prisoner would have nothing more to do, than cause his witnesses to be introduced on the part of the State—they might therefore pass for truth any falsities they might think proper to utter. It is a very easy matter to procure them to be introduced for the State, as

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the Solicitor-General, not being acquainted with the witnesses, would think it his duty to summon and introduce all such persons as he was informed could swear any thing against the prisoner. Judge HAYWOOD—No light that can be thrown on this subject should be excluded, nor any means left untried to place the fact in its true point of view. The witness has sworn to some circumstances which are very material in the present case: and if untrue, they should be rectified. If she has related the fact differently to other persons, it is a good reason for giving the less credit to her relation now.

The witnesses to discredit her testimony, were called. One of them related the story she told a few days ago, in which several circumstances now mentioned by her were omitted. Two witnesses were called to support her credit—they said she had told the story in their presence at different times exactly as she now told it in court.

This closed the evidence on both sides—a summary of which stands thus: On Saturday night, *Norris & Young* returning from the races, *Norris* went in at *Mrs. Ramsay's*, whilst *Young* waited for him in the piazza. In the house, *Norris* talked with *Ramsay*, sitting on the bed, and supper coming on, he retired and went up the street—*Young* going down. *Dudley & Daves* understanding from *Campbell*, they had come there to quarrel, stripped, went out calling for them and saying they were cowards—*Norris* at this going down the street, passed near *Mrs. Ramsay's* not far from which they were. *Daves* accused him of coming there to breed a riot—*Norris* denied it. *Daves* insisted upon it, and proceeded to abusive language, which *Norris* retorted and *Daves* repeated, tripping up his heels and kicking at him whilst on the ground. *Norris* rising, *Daves* struck him, and *Norris* called to *Campbell* to take notice. *Dudley* then advised *Daves* to take satisfaction, and *Daves* struck *Norris* three or four blows. *Norris* ran off towards his own house, distant from *Thompson's*, which was twenty yards below *Ramsay's*, fifty, eighty or an hundred yards—*Daves* and *Dudley* went down the street towards *Thompson's*, where they found *Young* stripped. *Dudley* stood in the street, opposite *Thompson's*, conversing with *Young*. *Daves* also stood in the street, near *Thompson's*, conversing with *Mrs. Thompson*. *Norris*, after an absence of three or four minutes, returned running, and as *Mrs. Thompson* says, stopt in the street

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opposite to them—as the other witness says, he ran up to *Daves* without stopping—*Daves* discovered him, and went towards him. *Mrs. Thompson* and *Dudley* say, *Daves* enquired whether he had a weapon, club or stick, which *Norris* denied and they met. *Campbell* says, *Norris* cried out, come on, I am ready for you. *Mrs. Thompson* says, blows passed upon their meeting, which she believes were given by *Daves*. *Dudley* says, he did not see *Daves* strike before the stab—the other witnesses say nothing of blows at this time. Immediately upon the last meeting, the deceased received the mortal wound of which he died.

(440) *Jones, Solicitor-General*—The crime of which the prisoner is indicted, is that of murder. There is no doubt but that a homicide was committed by him, and I will not dwell upon such parts of the evidence as go to the proof of that—the counsel for the prisoner will not deny it—neither will they deny, but that this homicide is either murder or manslaughter. I shall endeavor to prove from authorities, that a homicide committed under such circumstances, amounts to murder. The definition of murder is this—when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the public protection, with malice aforethought, either express or implied. The grand distinction between murder and manslaughter is, that murder is accompanied with the circumstance of malice aforethought and manslaughter not. It is this circumstance that makes a homicide amount to the crime of murder: whenever therefore the question is, whether the homicide amounts to murder or not, the first thing to be enquired for is, was it done with malice aforethought. And as this circumstance is so very material, it is proper, the jury should have a clear conception of its legal signification. The term, malice aforethought, is used in a legal and technical sense, and has not the meaning which in common acceptance is usually affixed to it—in devolence, grudge or ill-will to a particular person: for homicide may amount to murder, though the slayer may never before have seen or heard of the person killed—as if a man resolve to kill the first man he meets, and goeth out and kills a man he never before saw; or if he discharge a gun amongst a multitude of people, none of whom he knoweth any thing of; or if he goes with an unruly horse used to kick,

amongst a multitude of people, and the horse kicks one with whom he had no previous acquaintance, so that he die; or if intending to kill one man against whom he had malice in the common sense of the word, and striking or shooting at him, he kill another without any design against him, and with whom he had no previous quarrel, nor any ill-will against him—all these homicides are malicious, though in none of them had the slayer had any particular ill-will against the person killed. The true legal idea of malice, as applied to the case of killing, is, where the fact of killing is attended with such circumstances as shew the slayer to have a cruel and diabolical temper and disposition, above what is ordinarily found amongst mankind, or a heart regardless of social duty, and totally bent on mischief. *Foster* 225, 257. It is the cruelty of the action, and the malignity of heart the action discovers, to which the law attributes the crime of murder; and which causes the killing to be considered as unfit to be reduced to any species of homicide inferior in denomination and punishment to that of murder. This cruelty and malignity of heart is discoverable from the action itself, and the causes that lead to it. If the cause that led to it be such a conduct on the part of the person slain, as would in ordinary tempers have produced only a slight resentment, not rising so high as to aim at the life of the offender, but only to a punishment proportionable to the offence, and yet the person offended has attacked and beaten the other, in such a manner or with such a weapon as shews an intent to kill, and not only to chastise; and in beating he has killed the other, the law will deem it murder: because the beating in a cruel or unusual manner, or with such a weapon, are circumstances attending the fact which shew the heart of the slayer to have been more than ordinarily cruel and regardless of another's woe. *Foster* 259. The law deems it proper he should answer for all the consequences of his cruelty, to their utmost extent; and that one who has behaved himself with so much obduracy and perverseness, should no longer be regarded as entitled to that compassion which the frailties of human nature may justly claim. He has acted not from the frailty of his nature, but from the unfeeling ferocity of a savage heart; and this circumstance causes the law to impute to him the crime of murder—a crime which seems worthy to be treated with no indulgence, but

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Oct. 1796. with the highest species of severity. So if A. invite B. to his house, where A. has a woman who lives with him, and B. and she disagree, and B. abuse her, and A. requests B. to desist from ill-treating the woman, for that he is bound to protect her; and B. shall continue his abuse and A. request him either to desist from abusing her or to leave the house, and B. gets up and throws a bottle of wine at the head of A. and immediately draw his sword, and B. with his sword kill A. it is murder: for the words spoken by A. were not improper, nor such as ordinarily would stir up a man, to whom such words on such an occasion were spoken, to seek the life of the other. yet B. having thrown a bottle full of wine with great force at the head of A. and by that having discovered an intent to kill him, and immediately having followed his intended blow with drawing his sword, another indication of his seeking the life of A. upon so slight an occasion, are circumstances that shew a disposition in the slayer, regardless of social duty and fatally bent upon mischief—a heart excessively cruel and turned to inhuman revenge, and therefore it is murder. *Keelyng* 120. Whenever this excess of cruelty appears, this disposition of the mind to enormous revenge, seeking upon no extraordinary provocation for the life of a fellow man—the crime of homicide amounts to murder. Also the crime of murder may be inferred from the circumstance of former grudges, in the present case, between *Norris* and the deceased; but I am willing not to insist upon this, because it was proved they were reconciled, and drank together at the races for the purpose of settling their dispute. The authority of 1 *H. P. C.* 191, may be produced, and I suppose will be produced, where there has been once a former fighting between the parties and a reconciliation, and a new falling out and fighting upon which death ensues, that it shall not in such case be attributed to the old grudge. I will admit this to be law, as it is not my desire to press any thing against the prisoner but what the law of the country and the evidence warrants. Unhappily, there is no occasion for resorting to the preceding quarrel, to fix upon the prisoner the guilt of murder. No case of killing upon a provocation given, has ever been adjudged manslaughter, where the provocation was no greater than that which was given in the present case, and the killing itself was committed with so much wickedness. Disputes and fighting in consequence of them, happen every day in the

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streets, and elsewhere, will the law say, when one is worsted, he may quit the affray, go home, provide himself with a knife, return and plunge it into the body of his adversary, and that he shall be guilty of no more than manslaughter? Such a doctrine will deluge the country in blood. The life of every man who is drawn into a quarrel and contends with another, will be in danger. What can be more cruel, more indicative of a malignant heart, than this deed of the prisoner? He quarrels with another and is beaten, a thing that happens every day, and that will happen so long as there are men; for this he quits the conflict, goes directly for a deadly weapon, returns and kills his antagonist. Would other men in general, in his situation, have taken up the cruel purpose of seeking so deadly a revenge? I think they would not; and it seems to me the act can appear no otherwise than as the effect of a cruel disposition, not of human weakness deserving of our compassion; and if it be the effect of cruelty, it amounts to murder. Had he not time in going 80 or an 100 yards and returning, whilst he was meditating the horrid deed, to admit one sentiment of humanity—to reflect and be diverted from it? For the honor of human nature let it be said, there are but few men in the world, who in all this time, would not have persuaded themselves to abandon the inhuman design—but very few who would not have been awakened and alarmed by the workings of so black a spirit within them, and have shrunk from its suggestions. The heart that could so long entertain the hideous fiend, must have been familiarized to its lessons—the cruelty of the act demonstrates it murder, and here is that cruelty in its most heightened colors.—(443)

The cases in the books where homicide is adjudged but manslaughter, have gone upon the circumstance of some great provocation given to the slayer—such as in its nature is calculated to excite the passions to the highest degree of turbulence—not upon that of anger or resentment conceived upon occasions of frequent and ordinary occurrence. Reproachful words spoken to the slayer, how provoking soever, will not reduce the act to manslaughter; because words do not generally excite to that degree of fury which aims at the life of the speaker. *Keelyng* 55. The aiming at his life therefore upon such a provocation, is a proof of that devilish spirit, regardless of social duty, which cares not for the evils inflicted upon others—

Oct. 1796. that perverseness of heart which the law punisheth. If two persons suddenly fall out and fight, and in the contest one kills the other, that is manslaughter: the blood is heated, the passions boil, rage dictates his conduct, and whilst the blows are passing, there is no leisure for reflection, nor time for reason to assume its empire. *Keelyng* 56. That is not like the case before us: here, the combatants were separated, and the fatal blow not given till three or four minutes afterwards; not until the slayer had gone 80 or an 100 yards and returned, after arming himself with a deadly weapon. Or if a man be provoked by a great indignity offered to him, as by pulling his nose, spitting in his face, or the like, and he kills immediately, the law will attribute the act to human frailty; but in all these cases the provocation is of the highest kind, and the killing sudden and instantaneous, before the slayer has time to deliberate or even think upon the act he is about to commit. *Keelyng* 135, 136. *Leach* 155. Any circumstance of deliberation accompanying the fact of killing, though the falling out is sudden and the killing a short time after, will cause the slayer to fall under the imputation of murder; as where two persons suddenly fall out, and the one goes away, saying he will get something and stick the other; and half an hour afterwards returns, having a great coat on and a weapon concealed under it, and throws down a foil, the play they were at before the quarrel began, and the deceased according to custom, takes up the foil and strikes the other, who draws out his weapon and kills—it was adjudged murder: not because the space of half an hour had intervened, but because the conduct of the slayer evinced deliberation and a cruel purpose. *Foster* 132. In the present case, there are circumstances which shew deliberation, and a design concealed in the breast of the slayer. He was asked, (444) whether he had a weapon? He said, no. Again—or a stick? He answered, no. Why did he conceal this circumstance? What other motive could he have, but to induce *Daves* to come upon him, that he might strike the fatal blow? This is as weighty a circumstance towards proving reflection as any of those, or all of them together, mentioned in the case last cited. As to the blows said by *Mrs. Thompson*, to have passed, immediately before the stab, no stress is to be laid upon them, because if they actually did pass, *Norris* had come to that spot armed with

a deadly weapon, to take away the life of the deceased, upon a black and diabolical design, the true sense of the term malice : and having killed in pursuance of that, he is guilty of murder, although he was stricken by the other before the mortal wound was given. Upon the most attentive consideration, I cannot but view this case as murder, and with the observations I have now made, I submit the fate of this unhappy man to the decision of the court and jury. Oct. 1796.

Mr. Hay, and then *Mr. Taylor*, answered the Solicitor, and commented upon the evidence at great length, and with much ingenuity, placing it in as favorable a light for the prisoner as possible : but as the true state of facts is as above collected, it is useless to report their remarks upon them. They insisted that the law so far as related to a case circumstanced like the present, defines manslaughter to be—when the fact is done in the heat of passion and resentment, excited upon violent provocation given : and the killing need not be whilst both parties are combatting, as *Mr. Jones* seemed to intimate upon the authority of *Keelyng* 56. But if committed in so short a time after the irritation, as that the passions have not had time to subside and cool, it is manslaughter only. And they cited *Rowley's* case, *Cro. Jac.* 296, where two boys fought, one beat the other and drew blood from his nose, who ran three quarters of a mile to his father, who came with a staff & struck the other boy that he died, this was adjudged manslaughter only, owing to the heat of the passions at the time the blow was given. They also cited several cases from *Com. Dig.* vol. 4, p. 258, to show that the killing with a deadly weapon (though the deceased were not fighting at the time) under the influence of violent anger, hath been adjudged manslaughter. They also cited 1 *H. P. C.* 82, and *Foster* 278. *Strange* 499. *Keelyng* 56, 135, 136, and *Leach* 155.

Judge HAYWOOD.—The case before us is of awful importance : every circumstance in it is worthy of attention and consideration : I am pleased at the solemn silence which hath prevailed during the progress of this trial. The offence of which the prisoner is indicted, is that of the murder of *Nathaniel Daves*. If he is guilty upon the evidence, weighed by the law of the country, public justice requires he should not be screened by any misplaced compassion ; and if upon the evidence he is not (445)

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guilty of the crime imputed to him, no influence whatsoever should prevail to hinder his acquittal. Whether he be guilty or not, depends upon the law and the fact: before we proceed to examine the fact, we should clearly comprehend what is meant by the term, murder. To fix the attention only to such circumstances as are material to be considered now, it will be sufficient to say, it is a killing with malice prepense. The other parts of the definition have been fully given by the Solicitor-General. Malice prepense is a legal term that needs explanation. It does not signify ill-will or malevolence against an individual; it means, as some authors express it, a disposition to do evil: as others, the symptom of a wicked, depraved and corrupted heart: as others, the sign of a heart regardless of social duty, and fatally bent upon mischief: by others, it is termed a circumstance attending the fact, that cuts off the slayer from all manner of excuse. All of them being only different modes of representing the same idea. By this latter explanation is meant, that when the killing is without any justifying, excusing or alleviating circumstance, it is then murder. There are a great variety of such circumstances: for instance, where the killing is committed by an officer in executing the sentence of a proper tribunal; the killing by such authority and for such a reason, is a circumstance that justifies the party. So also if a man kill another who is attempting to kill or rob him, or the like: here the killing being with a design to prevent the perpetration of as great an evil attempted to be brought upon an innocent person, is a circumstance that justifies the deed. If a man doing a lawful act in a proper manner, undesignedly kills another: here the killing being done without any design to kill, and without any negligence in the party killing, is a circumstance which excuses him. So if the party slaying hath been fighting with another, and declines the combat, and the other press him so hard that he is obliged to kill him to prevent his own destruction, or great bodily harm; this circumstance of killing to avoid his own destruction, though originally culpable in fighting with the deceased at all, will excuse him from the guilt of felony. And in all other cases, where the circumstances attending the fact, are such as will justify or excuse the party, he is not guilty of murder: because the circumstances are not such as leave him without excuse. Also, although the killing may not

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be attended with circumstances of justification or excuse, Oct. 1796.
yet it may be attended with such circumstances as will mitigate his offence, and afford him something to say by way of excusing or exempting himself from the guilt of murder: as where some great and violent provocation hath been given to him by the person killed, and he in the transport and fury of his passion killeth the other, the law in such case attributes the killing to the frailty of human nature, operated upon by excessive anger, excited by the unworthy treatment of the deceased; and both law and reason says, that a killing under such circumstances, should not be punished with the same severity as a killing without provocation, or without a very great one, and when the mind is cool and reflecting. The great distinction between murder and manslaughter is this, manslaughter is committed under the operation of furious anger, that suspends for a time the proper exercise of reason and reflection, and which hath been stirred up by some great provocation: for there are some provocations that are not indulged with an allowance of exciting the passions to such excess, and thus a distinction is formed between the different degrees of provocation—if it be by words or gestures only, it will not be sufficient to mitigate homicide into manslaughter; but if it be a provocation by some great indignity offered to the party killing, as by spitting in his face or the like, or by falling out and fighting, so that in either case it may reasonably be presumed the blood is heated, and the passions raised to such a degree as to suspend the proper operation of the reasoning powers, the exercise of judgment and reflection, such provocation will be a sufficient one to extenuate the offence into manslaughter.— But although a sufficient provocation be given, and the passions greatly excited, yet if a sufficient time intervenes for the passions to subside and cool, and after that the party provoked, killeth the other, the law will deem it murder; as having not been an effect of ungovernable passion, and from the frailty of human nature, but upon a principle of revenge after reason had assumed its proper station. What is a sufficient time for this purpose, hath never as I know of been precisely ascertained. It hath been adjudged that an hour is more than sufficient time. (447)
It seems to depend greatly upon the nature of the provocation, and must be left to the jury to decide. If in the

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case before them, they think sufficient time did intervene, they should find the prisoner guilty, though he had been greatly provoked before; if otherwise they should find him not guilty of murder, but of manslaughter only.— Also, although the slayer hath been greatly provoked, and was agitated by resentment and anger in the highest degree, and hath not had a sufficient time for cooling before the fatal stroke given, yet if in fact he appears to be possessed of deliberation and reflection, when or just before the time he gives the mortal blow, it will be murder. As where two men quarrel, and agree to fight, and the one observes to the other, he must first change his shoes, as they would render him less expert with the sword; and they afterwards go out and fight, and he kills the other, it is murder; because the remark he made shews deliberation and reflection. For always it is to be observed, that the law allows the offence to be extenuated only upon the ground, that the slayer has not the free and proper exercise of his rational faculties, owing to the fury of resentment not unreasonably conceived. There are other distinctions between murder and manslaughter not necessary to be now taken notice of, as they have no relation to any such case as is framed by the evidence now before the court. It is most proper to state only such parts of the law, concerning homicide, as being compressed into a succinct compass, may serve to exhibit a clear view of the distinction between murder and manslaughter as far as regards this case. The next thing to be done, is to apply such parts of the evidence as are material, to the rules just laid down. The first thing that presents itself is, *Norris's* going in *Ramsay's* house. He does not appear to have behaved illy there; from the whole of the evidence it does not appear he went there with a design to quarrel; he had retired before *Daves* & *Dudley* stripped and went out. They hallooed for him and *Young* in the street, calling them cowards. *Daves* charged *Norris*, when met, with a design to raise a riot: he denied it again and again, till called a damned liar; when he retorted the lie conditionally; *Daves* tripped up his heels, kicked at him on the ground, struck him after he had risen; and upon *Norris's* intimating an intention to resort to the law for redress, repeated his blows three or four times; when *Norris* ran off. Now the question arises, was this a great provocation? would such treatment

excite the passions of man in general to a degree of excess? I think it would. If *Norris* had killed *Daves* on the spot, I think it would have been but manslaughter. *Norris* returned in three or four minutes, and gave the fatal stab. If he came up and nothing more passed before the stab, as the witnesses *Campbell* and *Dudley* say there did not, then it is for the jury to consider, whether the three or four minutes intervening between the blows near *Mrs. Ramsay's*, and the stab opposite *Thompson's*, was sufficient time for the passions to cool. If it was, the killing was murder. If it was not, the case falls under the same consideration as if the fatal stroke had been given when *Daves* first struck him. If the jury believe what was sworn by *Mrs. Thompson*, and which the other witnesses do not mention, that *Daves* when he advanced towards *Norris* after his return, struck him two or three blows before the stab, they have a right to consider whether that was not a fresh provocation, sufficient to extenuate the homicide into manslaughter. If, however, the jury believe there was not a sufficient time for the passions to subside, and that the blows mentioned by *Mrs. Thompson*, did not pass, yet the circumstances related by two witnesses of *Norris's*, having twice denied his having a weapon or club, as it tends to evince deliberation and reflection, must be taken into their consideration; and if they believe from this circumstance that he at that time had a reflecting capacity, and meant to conceal the weapon from *Daves* in order to draw him on, that he might kill him, then he is guilty of murder. It is proper, however to observe, that such a conclusion is in some sort negatived by *Mrs. Thompson*, who declares *Norris* told him to stand off, or the worst would be his. The jury will now take the law, the facts, and the circumstances of this case, and by a careful comparison of the one with the other, they will draw a conclusion and say whether the prisoner is guilty of murder or manslaughter. I trust I have stated the law correctly.

Judge WILLIAMS.—I agree with Judge HAYWOOD except in a few particulars: he says, malice is understood of a killing under such circumstances as cuts the party off from all manner of excuse. I do not think this a true position, he may have some kind of excuse, as a slight provocation or the like, or a provocation not sufficiently violent, he may in short have some sort of excuse, and

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yet be guilty of murder. I cannot think it an excuse to reduce the offence to manslaughter, where two persons quarrel and fight, and one goes some distance, gets a knife, returns and kills the other with it—such disputes happen every day. If we say it is not murder to kill shortly after, under such circumstances as this man was killed, much blood will be spilt in a very short time—it will be establishing a dreadful precedent. *Norris* ran off from the first combat and went home, he got into his house, his castle of refuge and defence, where no one would have offered to molest him—why did he not remain there? Why take his knife and return back eighty or an hundred yards to an enraged man? Did not this shew a murderous intent, and that his heart was bent upon cruelty? I think it is no matter what provocation the slayer may have received from the other, if notwithstanding that he appears to have possessed the faculty of reflecting. It is a temporary frenzy occasioned by passion, and depriving the man for the time of his reason, that the law considers and goes upon in estimating and reducing the homicide to manslaughter; but there is not any evidence in this case of a deprivation of reason, but evidence of the contrary. He denied having any weapon, when expressly asked whether he had or not? The jury will consider why and for what purpose he made such an answer. If he had any certain end in view, it is an evidence that his reason and judgment were not overturned. On occasions like the present, we are not to give up ourselves to the guidance of commiseration, we ought inflexibly to do justice without regard to consequences. I am sure I have as much feeling and compassion for my fellow-creatures in distress, as any man; but it is great cruelty to the public in a Judge or juror, to acquit a murderer from motives of compassion. It encourages such offences, besides how is the prisoner dearer to us than the person slain, who may have left a wife and helpless orphans to deplore his loss, deprived of their only friend, and now exposed comfortless to the world. I do not know what was the situation of the deceased, but this may be the case with persons who fall by murderous hands, and their dependants. I meant not to prejudice the case of the prisoner, but only to express my idea of the impropriety there is in shewing favor. If the prisoner by his conduct has subjected himself to the punishment of the laws of his country, we were not the cause

of his transgression. If any mishap befall him, it is his own fault, not ours—we should never attempt to trample upon the rules of law from motives of mercy or compassion. Oct. 1796.

The jury retired, and after some time returned, and found the prisoner not guilty of murder, but guilty of manslaughter; and he was burnt in the hand and discharged. (450)

NOTE.—The cause of reporting this case with so much minuteness, is, that the public opinion ran very high against the prisoner, before and after his trial, and he was pronounced guilty of murder by many who were present at his trial. The jury who acquitted him, were highly censured. Perhaps the learned may be of opinion, when they meet with this case, that the jury gave a proper verdict. It is possible that may become the general opinion. If so, probably some of those who are to be hereafter concerned in trials of this sort, may be led to reflect on the rapidity with which a wrong opinion sometimes spreads its influence over the public mind, and to be cautioned, that a popular sentiment, however honest and well meaning it may be, may sometimes become current for want of sufficient consideration or information, & as frequently so, respecting matters of judicial deliberation as any others. That it may be destructive of individual safety, and should be watched and guarded against with the same firmness and circumspection as the influence of a King or his Ministers in a Monarchy, when attempting to interfere on such occasions. Should the reading of this case sufficiently impress the minds of any who may hereafter be called upon to decide on such occasions, with the propriety and usefulness of such a caution, something will be added to the stock of individual security, and of course to the public happiness, and the labor bestowed upon this case be amply compensated. At any rate, the attributing improper motives to any who are from duty concerned in such trials, is of pernicious example. It has a tendency to distract the judgment by the terror of public censure, and to render it less efficacious in perceiving facts and circumstances in their true light—the opinions of men may differ, and yet all be actuated by the purest intentions.

NOTE.—In *Cock's* trial for treason, *Salk.* 153, the court decided, a juror could not be asked on oath, whether he had expressed an opinion unfavorable to the prisoner; because it was a misdemeanor to give such an opinion in a criminal case—but *quere*, if that be a good reason—*Vide State Trials*, vol. 4, p. 184, 185.

NOTE.—The acts of 1806, *Rev. c.* 693, s. 12—1808, *Rev. c.* 745—1813 *Rev. c.* 853, provide for the removal of causes to another county, where it is apprehended that a fair trial cannot be had in the first county. It is now the universal practice in this State, in capital cases, to ask each juror whether he has formed and expressed an opinion relative to the guilt or innocence of the prisoner, and if he has to set him aside. The decision relative to the State's discrediting its own witness is not law. See *Sawrey v. Murrell & others*, 2 *Hay.* 397. But the party calling a witness, may disprove by other witnesses, the fact which the first witness swore to. *Bull. N. P.* 297. *Alexander v. Gibson*, 2 *Camp. N. P. Rep.* 555.

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State v. Oldham.

The act of 1779, *Rev. ch. 157, sec. 2*, respecting the appointment of Jurors, is only directory, and does not apply to Grand-Jurors.

(451) He was convicted at this term, of the murder of one *Archibald Jackson*, and it being demanded of him what he had to say, why sentence of death should not be passed, his counsel, *Mr. Duffy* and *Mr. Taylor*, offered reasons in arrest of judgment, all of which were abandoned in the course of the observations made upon them, except the following, viz: That several of those who were of the grand jury that found the bill, naming them particularly, amongst whom was *Mr. Hodges*, the foreman, were persons who then severally had a suit or suits depending and at issue in this court, and were therefore disqualified to serve as jurors; and for the maintenance of this objection, they relied upon 1779, *ch. 6, sec. 2*, in which is this proviso, viz: Provided always, that no County Court shall knowingly nominate any person to serve as a juror at two courts successively, or any person who shall have an action or suit at issue in the Superior Court, at the term to which he shall be so nominated; and they said, that under this clause, Judge MACAY and Judge HAYWOOD, on the Western circuit of the spring 1795, had rejected all such jurors as disqualified.

Per curiam—This act is only directory. The intent of it was to exclude suitors from the petit jury, from an apprehension lest, in the course of the term, such persons might combine mutually to serve each other. This is not to be apprehended in the case of a grand-juror, who has it not in his power to render a *quid pro quo* in the same way, should he be ever so much inclined. This act is as well directory to the Superior as to the County Courts. If the County Court ought not knowingly, to nominate suitors for jurors, neither ought this court knowingly, to receive them as petit jurors when sent. The intent of the act is, that they shall be excluded, and so far as the view of this act extends, the Superior Court will not suffer its object to be eluded. Upon this ground, the court proceeded in the spring circuit of 1795. *Et per WILLIAMS*—that practice was well begun, and I do not know why we have not continued it. The reasons were overruled.

Anonymous.

Oct. 1796.

In this case the question was, how the two terms should be computed, within which, a complainant or an injunction bill, must proceed after the dissolution of his injunction, whether the present term not being yet ended, should be reckoned as one, this being the second, exclusive of that wherein the dissolution took place.

Per curiam—The present term is to be accounted the second, and if he has not proceeded before we come regularly to his cause on the Equity days, his cause shall be dismissed; and the suit in the present case was dismissed. But on the last day of the term the Defendant's counsel being absent, *Mr. Hay* shewed that the complainant actually had proceeded within time, and the dismissal was ordered to be stricken out.

NOTE.—*Vide Anonymous, ante 162, and the cases there referred to.*



HALIFAX, OCTOBER TERM, 1796.

Parker and Wife v. Phillips.

Where a father, upon the marriage of his daughter, sends negroes or other property with her in marriage, it is *prima facie*, a gift.

Trover for a negro, which the father of the Plaintiff's wife (and also of *Phillips*, who claims under a subsequent gift,) sent with her on her marriage, to her husband's house. About a year afterwards, in occasional conversation, he mentioned to his daughter, that he had not intended ever to take the negro away from her, when he sent her to her husband's house. There was other evidence, but upon this, *STONE, Justice*, ruled according to the former decisions in the cases of *Perry & Farrell*, *Carter & Rutland*, and *Whitmell v. Moore*, decided at Edenton, prior to the two others—where a father, upon the marriage of his daughter, sends negroes or other property with her upon her marriage, to her husband's house, that it is a gift, unless the contrary be proven: which in the present case not having been done, there was a verdict and judgment for the Plaintiff.

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NOTE.—*Vide Farrell v. Perry, and the note thereto, ante 2.*

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Smith v. Powell.

Though a judgment is not negotiable, yet the law will so far take notice of an assignment, as to protect it against the act of the assignor.

This was a *sci. fa.* to revive a judgment, and payment pleaded: and on trial of the issue it appeared, that on the day when the judgment was obtained, it was assigned by *Smith* to *Barkesdale*—that afterwards, execution issued and was put into the hands of the Sheriff, who returned, satisfied as to costs. *Smith* and *Powell* both informed him, that certain judgments which *Powell* had obtained against *Smith*, were agreed to be set off against this judgment of *Smith's* against *Powell*, and by that means, the whole of the judgment was satisfied. About six months ago, *Smith* gave a receipt to *Powell* for the money due upon the judgment. The counsel argued as this was done without the knowledge or consent of *Barkesdale*, it was fraudulent and void. On the other hand, it was argued that a judgment was not assignable so as to vest the legal interest in the assignee, and that the Plaintiff in the judgment, notwithstanding the assignment, might receive the money due upon it, and might give a good discharge to the debtor.

Per curiam—Though a judgment strictly speaking, is not negotiable, it may be *de facto* assigned, and such assignment will give an interest to the assignee which the law will take notice of, and protect against the acts of the assignor. This was decided some years ago, in the case of *McDaniel & Tate*, at Morganton. There was a verdict and judgment for *Smith*, whose name was used by *Barkesdale*, the assignee.

NOTE.—The case of *McDaniel & Tate* was thus: *McDaniel* had sold a negro to *Tate*, and had taken a bond for tobacco, which he assigned to *Wier*, who sued *Tate* in the name of *McDaniel*, in the County Court of Burke. *Tate* attempted to defend himself by proving the negro to have been unsound. There was a verdict in the County Court, and the cause came up by appeal to the Superior Court, and depended in that court for trial. *Tate* had full knowledge of the assignment to *Wier*, and had conversed with him on the subject at different times, as the proprietor of the bond. *Tate* however, prevailed upon *McDaniel* to give him a release, and gave him a considerable reward for it, and by his attorney, *Mr. Avery*, pleaded it since the last continuance. At the trial, it was insisted by the Plaintiff's counsel, and so ruled by the court, that all the former pleas were waived by this plea since the last continuance. The Plaintiff's counsel then insisted that this was

a fraudulent transaction between *McDaniel*, the nominal Plaintiff, and the Defendant, to defraud *Wier*, who had such an interest as the law at this day, will take notice of, though it was otherwise held formerly, and cited 1 *Term Rep.* 619, *Winch v. Keeby*. And upon this, the court charged the jury to find for the Plaintiff; which they did. A new trial was moved for, and a rule to show cause, obtained and enlarged to the next term, when the matter of law was argued before Judge ASHE and Judge MACAY, who decided the directions were right, but *Avery* alleging he had been taken by surprise, they offered him a new trial for that cause, if he would pay the costs up to that time, which being considerable, and he having filed a bill in Equity for relief, he refused to accept of the new trial upon those terms, and there was judgment for the Plaintiff.

NOTE.—*Vide Hogg's Exr's. v. Ashe*, post 471. *S. C. Conf. Rep.* 1.—*Wofford v. Greenlee*, *Conf. Rep.* 79.

SALISBURY, MARCH TERM, 1797.

Yarborough v. Giles.

Where, in appeal from the County Court, and a new trial had in the Superior Court, a verdict for as great a sum was obtained in the Superior Court as had been rendered in the County Court, HAYWOOD Judge, thought judgment might be entered up *instantly* against the appellant and his securities, under the act of 1785, *Rev. c.* 233, s. 2. But STONE, Judge, was of opinion the act did not apply in such case.

This was an appeal from the County Court, and upon a trial here this term, there was a verdict for the Plaintiff for as great a sum as there was in the County Court; and the Plaintiff now moved by his counsel to enter up judgment against the sureties in the appeal bond, according to the act of 1785, c. 2, s. 2.

Judge HAYWOOD.—It may be done, the act is express. Judge STONE.—The sureties are not in court: if a judgment is now entered against them, it will be to condemn them unheard: the law which says this, is a harsh one, and should be construed with all possible strictness according to the letter: the act says, when any appeal prayed shall not be prosecuted, or the court before whom the appeal may be determined, shall affirm the judgment, then shall the appellant be decreed to pay to the appellee, twelve and a half per cent. interest, from the passing of the judgment in the County Court, by which such appeal may have been granted; and the bonds taken for prosecution of appeals with effect, should hereafter make part

Mar. 1797. of the records sent up to the Superior Court, on which judgment may be *instanter* entered up against the appellant and his securities. The sentences respecting the twelve and a half per cent. and that of entering up judgment against the sureties, were conjoined by the particle *and*—judgment may be entered *instanter* against the sureties, where the appeal is not prosecuted, or where the judgment is affirmed. A judgment is not affirmed where there is a new trial in the court above, for then that court gives a new judgment. The judgment of the County Court is only affirmed when the appeal is not prosecuted (454) and the appellee for that cause moves for an affirmation of the judgment below. That is not the present case, the appeal has been prosecuted.

Judge HAYWOOD.—I think there are two cases specified in the act, that entitle the Plaintiff to enter up judgment; first, if the appeal shall not be prosecuted; secondly, if the judgment shall be affirmed—and that the affirmation of judgment here spoken of, intends a judgment in the Superior Court, obtained for the same or a greater sum than the judgment in the County Court.—The affirmation here spoken of, is not meant of an affirmation upon motion for want of prosecuting the appeal; for then the latter part of the sentence means the same as the former part: when it is evident from their disjunction by the Assembly, that they were meant to express different circumstances.

Judge STONE.—I am of opinion the act does not necessarily embrace the case now before the court. I am willing, however, a notice may be issued to shew cause. So the Plaintiff did not obtain judgment *instanter*.

NOTE.—HAYWOOD's opinion seems the correct one, as it is constantly acted upon.

Surviving Partners of Auley McNaughton and Co. v. Hunter.

Under the acts of 1777, *Rev. ch. 115, sec. 10*, and 1793, *Rev. ch. 392*, it is held, that a plea in abatement is not the proper mode to take advantage of the Plaintiff's having brought his suit in the Superior Court, for less value than fifty pounds.

Plea in abatement, that the Plaintiff's demand is not of the value of fifty pounds.

Williams, for the Plaintiff. The act of 1777, *c. 2 s. 10*, directs, that no suit shall be commenced in the Superior

Mar. 1797.

Court, of less value than fifty pounds, where the parties live in different districts ; and if any person shall demand a greater sum than is due, on purpose to evade this act ; or if any suit shall be commenced contrary to the true meaning of this act, the Plaintiff in either case shall be nonsuited and pay costs. Provided that if the Plaintiff, or any person for him, will make an affidavit that the sum for which his suit shall be brought, is really due, but that for want of proof, or that the time limited for the recovery of any article bars a recovery, then, and in that case, the Plaintiff shall have a verdict and judgment for what appears to be legally proved, &c. The same clause is repeated and re-enacted in a subsequent act passed lately. The pleader of the plea has supposed, the court has no jurisdiction where the sum really due is of less value than fifty pounds, and has accordingly pleaded in abatement ; but this is a mistake, as becomes evident if we only consider the consequences of a plea in abatement, and how different the course of proceedings must be upon that from what the law intended. Suppose part of the demand is barred by the act of limitations, how is the Defendant to take advantage of that circumstance, upon a plea in abatement, or how is the Plaintiff to know of his intention to take advantage of it before the trial ? Is the Defendant to be permitted to plead a plea in abatement, and to give the statute in evidence ? Suppose he has a set off reducing the sum below fifty pounds, is that to be a set off upon this plea in abatement without notice given ? If not, how is the sum really due to the Plaintiff to be ascertained, if the verdict upon such a plea should find the sum really due to be less than fifty pounds, & the Plaintiff then makes the affidavit required by the act, will the court give judgment in chief upon such a finding ? They cannot, for the jury upon issue joined on a plea in abatement, are not to assess damages but only when they find against the plea : in the case I have supposed, they would find for it. It is argued, a plea in abatement is most proper, because the Plaintiff cannot be nonsuited after the finding of the jury. It is true, he cannot voluntarily suffer a nonsuit in common cases, nor indeed can he in common cases, be nonsuited against his consent ; but if an act empowers the court to nonsuit him, whether he will or not, they may in that particular case give judgment as in case of a nonsuit. This is only a critical objection—it does

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Mar. 1797. not meet the act. We are to form our judgment upon that, and its true meaning. It is plain from the cases I have before stated, the objects of the act cannot be attained by a plea in abatement.

The court gave judgment of *respondens ouster*, and all costs up to the time of overruling the plea.

NOTE.—*Vide Allen's exr's v. Stokes, ante 122.*

Per curiam—Where the Defendant dies, there must be a *sci. fa.* against the executors, to make them parties.— But where the Plaintiff dies, there needs no *sci. fa.* for the Defendant is continued in court two terms by the act of 1786, *ch. 14*, and 1789, *ch. 57. sec. 7*—and the executors may come in and pray to be admitted to prosecute, and the court will permit them to do so without any process.

State v. Bromfield Long.

Naked confessions, unattended with circumstances, are not sufficient to convict of a capital crime.

Indictment for horse-stealing, upon which the evidence was—that the horse was missing, and about three days afterwards, two men came with the horse, and Long tied, to the house of the owner. Long confessed to the owner he had taken the horse, and begged forgiveness. The two men who brought him were not present at the trial, and there was no other circumstance proved in the case.

(456) *Per curiam*—Where A. makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself, would make a confession to take away his own life. It must generally proceed from a promise or hope of favor, or from a dread of punishment, and in such situations, the mind is agitated—the man may be easily tempted to go further than the truth. Besides, the witness, respecting the confession, may have mistaken his meaning. How easy is it to

understand the speaker, differently from what he meant; and the smallest mistake in this particular, might prove fatal. As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner. The jury found him not guilty. Mar. 1797.

NOTE.—*Vide 1 Phil. on Evid. 86, contra.*

Cupples, Guardian of Allen, v. ———.

In a *caveat*, a verdict was found against the Plaintiff, which was confirmed in the County Court, before which time however, the Plaintiff had obtained a grant from the State for the land; and now in the Superior Court, it was held, that the grant could not be impeached at law, but as the Defendant appeared to have had the justice of the case on his side, he shall have the costs of the *caveat*.

This was a *caveat*. Upon the trial, the jury found for the party opposed to *Mr. Cupples*, which verdict was confirmed by the County Court; before which time, *Mr. Cupples*, for his ward, had obtained a grant from the Secretary's office; and the verdict and proceedings of the County Court were moved into this court.

Per curiam—There have been so many decisions that a grant, although irregularly obtained, is valid in law, that we think ourselves bound by them at present—although we cannot subscribe to the reasoning of them, of course it is useless now to consider whether these objections to the verdict are valid or not. However, with respect to costs, it is necessary to say something—there can be no doubt, but in point of Equity, *Mr. Cupples* should pay them—there has been the verdict of a jury against him, and that verdict confirmed by the County Court; upon argument he has caused an abatement of the suit, like that partial abatement which sometimes happens in case of the death, destruction, or ceasing of the principal thing in dispute, so that the court cannot give judgment for it—as where an action is brought against tenant *per autre vie*, and *cestui qui vie* dies, demandant may proceed for damages for detention; in ejectment for lands leased, if the lease expires before a decision, Plaintiff may proceed for damages and costs.—Here, before the suit is decided, one of the parties puts an end to it by removing out of the court's power the thing in controversy. The court cannot give judgment upon the merits of the dispute, or for the principal; but

Mar. 1797 the party may proceed for the accessory. There was judgment for costs.

NOTE.—As to the grant's being unimpeached at law, see *Reynolds v. Flinn*, and the note thereto, *ante* 106.

Anonymous.

Per HAYWOOD, Judge. The County Court, after establishing one ferry at a particular place, has no right to establish another so near the former, as to draw away its profits. But *per STONE, Judge.* The County Court is empowered to establish ferries where necessary, and may establish two at the same place, if it is deemed proper to do so.

There was a ferry established by order of the County Court, on the river near the court-house; and sometime afterwards, upon some complaint to the County Court, that the people of the county were often delayed on public days, for want of crafts and ferrymen, they made an order, permitting another person on the other side of the river, to keep a ferry at or near the same place; and from this order, the former ferryman appealed.

Judge HAYWOOD—These orders, for keeping ferries, made by the County Court, are like grants of the King for the same purpose in the English law; and the liberty granted by them, like those in the King's grant, are forfeitable for *abuser* or *non user*: but there is no evidence set up of improper behaviour in the ferryman; of *non user* or *abuser*. The act of 1784, *ch.* 14, *sec.* 1 & 15, has ordered bonds to be given by the ferryman, in a large penalty, for the faithful and punctual discharge of his duty; he is thereby liable for inattention in any special instances. By the same act, five pounds penalty is inflicted, for detaining any persons for want of hands, boats or attendance. With respect to ferries, the common law was, that no ferry should be erected so near another, bound by law to be provided with crafts, attendance, &c. as to draw away its profits. 3 *Bl. Com.* 219. 2 *Roll. Ab.* 140. It goes upon this principle, that such prohibition is for the public good; as the best way of encouraging expensive undertakings, for the service of the public, is to secure to the undertaker the profits accruing. The principle of our act of Assembly is the same. 1787, *ch.* 16, *sec.* 1, inflicts a penalty on those who transport passengers across at public ferries, not being duly authorized. So does the

act of 1764, *ch. 3, sec. 4*. They deem it unreasonable, to suffer another to interfere with the profits of a ferry already established, at a considerable expence perhaps to the owner, as such interference is discouraging to undertakings of that sort, and of course disadvantageous to the public. This being the principle of our law, I am not for allowing another ferry to be established at or near the same place—it might divide the profits so as to render the ferry of no value to either. Apr. 1797.

Judge STONE—The act of Assembly empowers the County Court to establish ferries where necessary—they are the proper judges where it is fit to establish them.—If they deem it proper to establish two ferries at the same place, they may do so. There are two ferries established at the same place, in several parts of this State—this proves the power of the County Court to establish them. (458)
Sic adjournatur.

NOTE.—That the County Court does possess the power to establish more than one ferry at, or near the same place, seems not to have been doubted in the case of *Beard & Merrill v. Long*, 2 *Car. Law Repos.* 69, but it is there said, that the public faith pledged to the first grantee, ought not to be violated, unless the public interest manifestly demands the establishment of an additional ferry.

HILLSBOROUGH, APRIL TERM, 1797.

Kennedy & Co. v. Fairman.

Proof of the clerk's hand-writing, in entries made on the Plaintiff's books, shall not be admitted while the clerk is living, although he may be absent from the country.

Assumpsit, for goods, wares and merchandize, sold and delivered, &c. and upon the general issue pleaded, the cause now came on to be tried. The Plaintiff offered a deposition taken in Maryland, which proved the entries in the Plaintiff's books, to be in the hand-writing of a person who was a clerk of the Plaintiff's at the time when the entries were made, and who at the time of the deposition taken was on a voyage to the West-Indies.—*Davie*, for the Defendant, objected to this evidence, and cited *Cowper v. Marsden*, *Esp. Rep.* 2. He urged the danger of such evidence, for if it is receivable, a man may get his clerk to make what entries he pleases, and to what

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amount also he pleases, and then set out on a voyage to the East or West-Indies, and the entries will enable the principal to recover the monies contained in them, by proving the hand-writing of the clerk. *Williams, e contra.* Such evidence has been admitted in our courts. It was admitted in a case at Fayetteville, where the Plaintiff's clerk had gone to some of the Northern States.

HAYWOOD, Judge.—It has been admitted, I believe, in the case cited by *Mr. Williams*; that case was cited and stated by some of the bar at Fayetteville, in the course of their argument, some time after it took place. I was informed of the decision soon after it took place, but for my own part, I was always opposed to the principle of it, and took the earliest opportunity at the next term after it happened, and at Fayetteville, where the decision was given, to give it my disapprobation. There a case came before the court, where the clerk had gone to Georgia, and it was offered to substantiate the account by proof of his clerkship to the Plaintiff, and that the entries were in his hand-writing. This evidence was rejected by myself, and Judge WILLIAMS seemed to concur that the evidence was not proper. I am of opinion most clearly, the evidence now offered is improper, and ought not be received for the reasons offered by the Defendant's counsel. (459) The admission of such testimony would be immediately followed by a long train of frauds, as the committing of them would be rendered so easy and inviting by it.

Judge STONE.—I am of the same opinion. We should take care not to open a door to the practice of frauds.—The receiving of such testimony is certainly liable to the inconveniences mentioned by the Defendant's counsel.—The evidence was rejected.

Anonymous.

No point can be raised in a special verdict, except what appears upon the record. No person can plead the statute of limitations except the Defendant. The statute of limitations will run although the Defendant may be out of the country.

This was a special case for the opinion of the court, in which the question proposed was, whether the act of limitations would run against the Plaintiff when the Defendant was beyond seas. And *Mr. Duffy* brought on another question, which was not on the record, but which

as to its subject matter he said he could make out by proof; namely, whether a person called into court as garnishee, could plead the act of limitations for the principal Defendant, whose property was attached. For the latter point *Mr. Duffy* cited 2 *Bl. Rep.* 762, to 764. and as to the first, he argued that by the Equity of the act, it ought not to run when a Defendant was beyond sea. The reason why length of time is a bar at all, is because of the presumption from thence, that the debt is satisfied, though the evidence of a discharge is lost—where such presumption cannot fairly arise, the act will not attach. It cannot fairly arise here, for the Defendant hath been absent ever since the accruing of the debt. We may even suppose from this record, the debt was not contracted in this country but beyond sea, where the Defendant resides; if so, perhaps the debt is not subject to our act of limitations at all—certainly the act did not begin to run in this country, and if it did not, the being beyond sea is within the saving of the act. *Davie* argued *e contra*.

Per curiam—We are very clearly of opinion that the act of limitations cannot be pleaded by any other person than the Defendant. It does not appear, however, by the record, that the plea was pleaded by the garnishee, and we cannot receive any verbal testimony of that fact. We are bound to follow the record. As to the point, whether the act will run against the Plaintiff whilst the Defendant is beyond sea—the Defendant was in fact in this country when the debt was contracted, though that is not stated in the record so as to enable us to take notice of it—laying that out of the case, our act makes no saving in favor of a Plaintiff, where the Defendant is beyond sea. The British act, which had the same savings as ours, was always construed not to save the Plaintiff's action when the Defendant was beyond sea, and that occasioned the 4th and 5th *Anne*, c. 16, s. 19. If the Defendant was in this country when the contract was made, and the act began to run against the Plaintiff, it will run on notwithstanding the Defendant's removal; or if it had not began to run before his removal, his absence will not suspend its operation; or if he resided beyond sea at the time of the contract, and the Plaintiff will make use of the remedies offered by our courts, he must accept of them upon the terms imposed by our law; that is to say, he must bring his suit within three years. Length of

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Apr. 1797. time is naturally, and every where, presumption of payment; where no time is limited by law, the presumption is left to be governed by such circumstances as are sufficient to raise it; where the law has fixed the time, the presumption is not left to be regulated by opinion, but it must arise after the lapse of the prescribed time. If in this country no time was limited by an express law, yet payment of this debt might be inferred from a lapse of three years, wherever it was contracted. This proves, that all contracts wherever made, are subject to be affected by the lapse of time in every country, particularly by a lapse of three years, when there is no circumstance attending the case that can legally save the Plaintiff's right.

NOTE.--Upon the point of the act of limitations, see *Ridley's Adm'rs. v. Thorpe*, 2 Hay. 343. *McLellan's Adm'r. v. Hill's Ex'r. Con. Rep.* 479. *Jones v. Broddie*, 3 Murph. 594, which are constructions upon the act of 1715, c. 48. The two first of these cases would seem to establish the position that the act begins to run against the claim before there is any person in existence who can assert it, but the last case decides that there must be some person in existence at the time of the death of the debtor, who might have asserted his claim, in order to give effect to the statute. This case also mentions that in the case of *McLellan's Adm'r. v. Hill's Ex'r.* the fact that *McLellan* was alive at *Hill's* death, is omitted in *Con. Rep.* so that that case establishes nothing more than that when the statute once begins to run, nothing can stop it, which is well established by all the authorities. Would not the principle adopted in *Jones v. Broddie*, equally apply to the case where there is no Defendant in this country to whom the Plaintiff could apply?

Anonymous.

Where two judgments are obtained against an administrator, the first an absolute one, but the second a *quando* judgment, and assets afterwards come to his hands, *HAYWOOD*, Judge, said—that the assets must be applied to the first judgment; but *STONE*, Judge, seemed clear, that they should go to the satisfaction of the second.

This was a *sci. fa.* to have execution out of assets come to the hands of the Defendant since this judgment obtained against him of assets *in futuro*. To this *sci. fa.* the Defendant pleaded amongst other things, a former judgment. The jury found a former judgment recovered at *Wilmington*, not yet satisfied, and that fifteen pounds had come to the Defendant's hands since the judgment on which this *sci. fa.* is grounded, which was a judgment to be satisfied *quando assets acciderint*.

STONE, Justice—This fifteen pounds must be applied towards satisfaction of the latter judgment. As to the

former judgment, it is not a judgment to be satisfied out of assets *in futuro*; and when obtained, it must have been on the admission of the Defendant that he had then assets to satisfy it, otherwise he would have pleaded a want of them, and then the judgment would have been absolute as to the assets he had, and for the residue to be levied out of assets which in future should come to his hands. Apr. 1797.

HAYWOOD, Justice—When a judgment is rendered against an executor or administrator, though it be generally, to be levied *de bonis testatoris*, without saying any thing of assets *in futuro*, that judgment must be satisfied prior to any subsequent one. The executor may have suffered it, knowing assets would afterwards come to his hands sufficient to satisfy it—by admitting assets he has made himself absolutely liable to the debt. Shall he be absolutely liable, and yet not permitted by law to reimburse himself out of assets? Must he pay the former judgment out of his own pocket, though he has assets in his hands sufficient to satisfy it? Suppose he had paid this judgment, or the debt before judgment, with his own money, trusting to the coming in of assets for his reimbursement, would he not thereby have entitled himself to retain assets to that amount when they should come into his possession? If he could thus reimburse himself, having paid the debt or judgment, why not, when he has made himself liable to the payment of it? It is well known, an executor may plead judgments obtained against him when subsequently sued, and there is no instance of a replication, that the assets came to hand after the judgments were obtained. (461)

Some of the bar not concerned, expressed a clear opinion that the fifteen pounds should be applied to the latter judgment, whereupon, the court took time to advise; and afterwards, the cause being again mentioned, Judge HAYWOOD said, he continued to be of the same opinion he was the other day. There were not many authorities in point—he had however found one in 12 *Mod.* 196, where it is laid down, that the pleading of the judgment is a protection of the assets which you have or may have, until the judgment be satisfied.

STONE, Justice—I do not think that case applies—I am of the same opinion I was. The fifteen pounds should be applied to the latter judgment. *Sic adjournatur.*

NOTE.—*Vide* 1 *Saund.* 336 *b*, where it is said—“Where the executor pleads several judgments outstanding, and the Plaintiff takes a

Apr. 1797. judgment of assets *in futuro*, the future assets shall, in the first place, be applied to those judgments. Hence, there is a difference, as to the future assets, between a plea of *plene administravit* generally, and a special plea of *plene administravit præter* judgments."

Southerland v. Mallett.

A decree will be entered on an award, at the term to which it is returned, if no exceptions to the award be made at that time.

This was a suit in Equity, and all matters in dispute had been referred to arbitrators, who made an award in favor of Complainant—who now moved for a decree according to the terms of the submission. *Williams, contra*—A decree cannot now be entered on the award, for it was only returned to this term. The Defendant is absent, has not been served with the award, and has had no opportunity to except. *Davie* was stopped by the court.

(462) *Per curiam*—The practice never has been to wait for exceptions against an award. The party is present at the examination by the arbitrators—he is notified of the time—he may apply at the ultimate time appointed for its delivery or publication, and know the contents—he is or ought to be in court attending on his suit, and may except to any thing improper. If *Mr. Williams* will now make any exceptions, we will hear them, and if proper, give time to support them; but we will not wait for the party to make exceptions. No exceptions being made, there was a decree according to the award.

Anonymous.

The fifteen days before the term, in which appeals must be filed in the Superior Court, are inclusive of the day on which the appeal is filed, and also of the first day of the term.

This appeal was lodged with the clerk of the Superior Court on the 28th September—the term commenced on the 6th of October. After argument by *Davie* and *Williams*.

Judge HAYWOOD—I am of opinion the Legislature allowed fifteen days, for the purpose of affording the appellee time to come to the office and see whether or not the papers were lodged there, and afterwards, to go to any part of the State and get his testimony and return. In

other words, that it was intended to allow him fifteen travelling days, after knowing the appeal papers were lodged; and that therefore there should be fifteen clear days excluding the day of filing and the first day of the term. Suppose they had said, the papers should have been filed one day before the term; if it could be filed on the first day of the term, the appellee would have no time to prepare; if filed on the day before, and that allowed to be one day, it might be filed on the last moment of that day, and the term commence on the next, so there would be no time allowed.

STONE, Justice—In a case at Edenton last term, it was decided, that the day of filing and the first day of the term, were both to be reckoned inclusive. The reasons of this decision then appeared, and do now appear to me to be strong. These were, that heavy penalties were annexed to the not bringing a transcript up in time—affirmation of judgment with double costs by the act of 1777, twelve and an half per cent. interest by the act of 1785, and therefore the act ought to be so construed as to avoid the penalty, and not so as to multiply the chances of incurring it. Moreover, the right of appealing is favored in law, and ought not to be abridged by the construction we put upon the act.

Judge HAYWOOD—If it has been decided, though against my opinion, as it is only a matter of practice, and as uncertainty in such cases, is a great evil, I had rather adopt the decision than leave the matter in uncertainty.

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Per curiam—The papers were brought up in time; let the cause be placed upon the trial docket.

NOTE.—*Vide Anonymous, ante 402.*

State v. Bradley. [S. C. ante 403.]

The words assigned in an indictment for perjury were that "*Gatling* did not interrupt the constable in driving the cattle to *Gatling's* house," and the words proved were, that "*Gatling* did not assist in driving the cattle from the officer." It was held, that the words charged must be clearly and evidently of the same meaning without the help of any implication, or any thing extrinsic; and that in this case the variance was fatal.

This cause was now brought before the court, and they took time to consider of it, and to look into authorities, and after a few days gave judgment.

Apr. 1797. *Per curiam*—We have looked into the authorities in *Salk*. 660. *Doug.* 193, 665. *Cowp.* 229. 1 *Term* 235. 2 *H P C.* 436. s. 36. The result of these cases seems to be, that any the least variance in the description of a record, is fatal—and as to things written, that they may be described two ways; either by the tenor or according to the substance. When described by the tenor, the very words must be followed; but the omission of a letter, not altering the word to another, is not fatal. If you describe the thing written by its substance and effect, then you need not set down the very words written; but if you describe the same sense and meaning, it will do.—As to the words spoken, there can be no tenor of them, and therefore where the sense and meaning of the words set down in the indictment, is precisely the same with those proven in the evidence, though not the very same words, such evidence will support the indictment; but then the meaning must be evidently and clearly the same, without the help of any implication or any thing extrinsic. The oath charged to be sworn is, that *Gatling* did not interrupt the Constable in driving the cattle to *Gatling's* house: the evidence is, he swore *Gatling* did not assist in driving the cattle from the officer. The words contained in the evidence, are not necessarily of the same sense and meaning with those laid—therefore let the judgment be arrested, and it was arrested. *Vide L. R.* 1515. 2 *Stra.* 787.

NOTE.—*State v. Coffey*, N. C. *Term Rep.* 272. See also *Whitaker v. Freeman*, 1 *Dev. Rep.* 271.

State v. Adams.

In an indictment for horse-stealing, the jury may infer from circumstances, that the horse was taken by the prisoner, in the district in which he is tried, although, he was never seen with the horse, in that district.

Indictment for horse-stealing, and not guilty pleaded; and upon trial, the evidence was—that the horse was lost in Wake county, on the 10th, and was in *Adams's* possession, sixty miles from the place, on the 16th of the month. There he sold him to one of the witnesses, and said he had purchased him a few days before, near Edenton, distant from thence about two hundred miles.

Duffy, for the prisoner—There must be a proof of the taking, and that must be in the district where the priso-

ner is tried. In the present case, there is no proof of a taking in Wake, nor was the prisoner ever seen in possession of the horse in this district; the place where he sold the horse to the witness, is in the district of Salisbury. It is probable he might have received the horse from the person that did steal him. Apr. 1797.
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Per curiam.—When a horse is stolen, and is found in possession of a man, at such a distance from the place where the horse was missing, in so short a time after as shews he must have come directly from that place, and without any loss of time, that is such evidence as a jury may infer the guilt of the prisoner upon, as it raises a violent presumption against him, that he was the taker. It is however, not conclusive. Any circumstance inducing a probability that the prisoner may have gotten him honestly, will render it improper for a jury to convict.—The case in *Hale*, where a thief was pursued, and finding himself pressed, got down, desiring a man in the road to hold his horse till he returned, and the innocent man was taken with the horse, proves how necessary it is, to use caution in convictions founded upon presumptive testimony. There is however, part of the evidence in this case, which shews probably, that the prisoner did not get the horse from another. He said he had purchased him near Edenton—there was not time sufficient to travel the horse to Edenton, and back to the place, where the prisoner sold him. If from circumstances the jury infer a taking, the inference also follows that he was taken at the place where missing, and that was in this district.

The jury found him guilty, and he had judgment of death.

Galbraith v. Whyte.

Per curiam.—*Caveat emptor*, applies where a man purchases an article of personal property not in the vendor's possession. He ought in such case to require a warranty—the not being in possession gives reason to doubt.—Another case is, where the thing sold has some visible quality which lessens its value. Where it has a quality lessening its value, and that is not discoverable by ordinary inspection, it is otherwise; in such case there is no need of an express warranty—every man is bound to be honest—he ought to discover to the vendee all such pro-

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perties as if known might probably dispose him not to purchase. If a man sell an unsound horse, whose disorder is not known, and receives full value as for a sound horse, an action lies against the vendor; and that action may be an assumpsit stating the sale, and that the vendor undertook that the horse was sound.

NOTE.—Upon the subject of warranty on the sale of chattels, see *Bull. N. P. (Brid. Ed.)* 30, a. to 32. b. *Comyn's on Con.* 228 to 250. *Cooper's Justinian*, 609. *Thompson v. Tate*, 1 *Murph.* 97. *Lanier v. Auld's Adm'r. Ibid.* *Sheber v. Robinson & others*, 2 *Murph.* 33. *Gilchrist v. Marrow*, 2 *Car. Law Rep.* 607. *Erwin v. Maxwell* 3 *Murph.* 241. *Ayres v. Parks' Adm'r. &c.* 3 *Hawks* 59. *Inge v. Bond & Slaughter, Ibid.* 101. *Brittain v. Israel & others, Ibid.* 222. It will be seen, from some of the authorities referred to, that the position that a full price for a horse implies a warranty of soundness, although once supposed to be law, is now overruled, both in England and in this State.

Troxler v. Gibson.

An amendment cannot be permitted in an ejectment, so as to embrace land not included in the declaration.

Ejectment. The Plaintiff's patent described the last line as running a course and distance, which led not to the beginning, but through the body of the land. And the Plaintiff's attorney in drawing the declaration, following that description instead of saying, thence to the beginning; so as to have included the land in dispute, which lay between the beginning point, and that which terminated the last line as described in the patent. *Davie* moved for a nonsuit, saying it was needless to go into the examination of testimony, since it was impossible for the Plaintiff to give any evidence respecting the land really in dispute, as it was not demanded in this declaration.

Per curiam—Land not demanded cannot be recovered by any judgment of the court; and in the present case no land is demanded, but that which the Plaintiff has no claim to. This point has been often decided in our courts. It was so decided in this very court a few years ago, in the case of *Hunter and Jones*. Let the Plaintiff be called. The court recommended to *Mr. Duffy* to take a rule to shew cause why the declaration should not be amended, saying, perhaps authorities may be found to justify an amendment, or perhaps the act of 1790 may authorise it. A rule was taken. Afterwards the case was argued by *Mr. Duffy* for the amendment, and *Davie* against it. *Mr.*

Duffy produced a great number of cases, but seemed to rely chiefly on the case in 4 *Burr.* 2448. Apr. 1797.

Per curiam—These cases shew, that the demise may be enlarged, but none go so far as to shew, that the description of the thing demanded may be altered. If it could, a Defendant might be at a great expence in preparing to defend his title to one tract of land, and afterwards be forced to go through the same process as to another, and for a third, and so on *ad infinitum*. For if it is proper to alter the *petitum* in the first instance, why should it not be done afterwards as often as the Plaintiff pleases. If after the institution of the action, the Defendant sells that part, not included in the declaration, and then an amendment is permitted, which will include it, the purchaser having acquired the land *pendente lite*, will be bound by the decision though no party to it. The amendment would be of little service to the Plaintiff, as it would be required of him to pay all the costs up to this time. However, it suffices to say, there is no precedent in the books for such an amendment—the *petitum* cannot be amended. The court thought a day or two ago, that possibly it might be amended under the act of 1790, c. 3, s. 9, but upon consideration, we think that act does not extend to this case. It has been decided, that under that act all such matters of form may be amended, except such as are specially demurred to; and that where a special demurrer was not proper as to the matter, no amendment could be made. In ejectment there can be no special demurrer on account of the form, for the Defendant is admitted upon terms which preclude it; yet such irregularities as in other actions might be proper subjects for a special demurrer, shall in this be amended; otherwise, the ejectment, which is a liberal action, would be in a worse situation than any other. Special demurrers do not lie for not demanding the thing intended to be demanded in any action; that omission makes a substantial defect in the declaration, not a mere formal one. It cannot be amended in a point so material, any more than a demand of a horse in detinue or replevin, could be altered to that of an ox. So the amendment was refused.

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NOTE.—Vide *Adams on Ejectment*, 205, and *querre*, whether such an amendment would not now be permitted under the act of 1790. See the cases referred to in the note to *Cowper v. Edwards*, ante 19.

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Anonymous.

The caveator was settled upon a tract of appropriated land for many years, and supposed the land in dispute to be included within his boundaries, when in fact, it was not. The possession is stated to have been upwards of twenty one years. It was decided, that the caveator was not entitled by the entry laws of 1777 and 1779, as not having claimed within the time limited by the act—nor by the statute of limitations of 1715, which applies only to claimants under patents—nor yet by the act of 1791, limiting the claims of the State, as that act is bottomed upon the presumption of a former grant, and is not applicable to vacant lands.

Per curiam—The caveator was settled upon a tract of appropriated land for many years, and supposed the land now in dispute to be included within his boundaries when in fact it was not. This possession is stated to have been upwards of twenty-one years. It is now alleged, the jury have found an improper verdict in deciding the right of entry to be in the caveatee. It is argued, that the caveator is entitled, either under the entry laws, the act of limitations, or the act for limiting the claims of the State. We will consider each in its order. The act of 1777, *ch. 1 sec. 16*, entitles such as had actually possessed or improved any vacant lands, in preference to all others, to enter and obtain grants for the same, so that such entries be made before the first of January, 1779. Under this act, possession gives a right of pre-emption for a certain time. The right is temporary, and expires if not exerted before the period limited by the act; and the land became free for all persons who may chuse to enter and pay for it. He has no rights under this act, for he did not enter within the prescribed time. Then the act of 1779, *ch. 7, sec. 2*, is relied on, which enacts that persons who have settled within the bounds of a former entry or survey, and have improved and continued in peaceable possession for seven years, without interruption by or from the person claiming, or declaration of right to the person possessed under such entry or survey, the person claiming under such former entry or survey, shall be forever barred of his right of entry of the land in question, and preference shall be given to him who settled on and continued peaceable possession of the same, &c. It is argued, that a possession of seven years under this act, gives a title to the possessor. The object of this clause, is to correct the generality of the clause in the act of

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1777. By that or former entry or survey in *Lord Granville's* office, entitled the enterer to a preference of entry in ours; and by virtue of such former entry, he might turn a man out of possession, who perhaps knew nothing of the former entry and had settled upon the land and improved it and never had any intimation for seven years from the former enterer, of his pretensions to it. This was a hardship arising under the former law, and the Legislature meant to alter it, by declaring that such possession should entitle the possessor to pre-emption, rather than the former enterer. They did not intend to give him a property or dominion in the land, without entering it, and paying for it to the State; and of necessity, this right of pre-emption must be exercised within some limited time—for if it was confined to no limits, he might never enter at all, and might always destroy another's entry, by proving his seven year's possession, and so hold the land always, without either entering it or paying for it. This act was made in January, 1779, but was intended to regulate disputes that had arisen or might arise under the former act, and to empower juries to decide in favor of possession, where the former enterer had entered in the new office, before the first of January, 1779, or where the possessor had entered before that time; for no dispute could arise where the possessor had entered, or might enter after the first of January, 1779—the former enterer having made no claim before. The words “which may hereafter arise,” refer to disputes to arise upon caveats to be entered, or suspensions upon claims then already entered. If therefore the possessor for seven years, who had a right of pre-emption, did not exert that right before the time limited by the former act, it expired—the former enterer is forever barred to claim by virtue of his former entry; but he, as well as any other citizen might set up a new claim, as for lands open to be entered by every citizen indifferently. The caveator has no right then under this act; he has not claimed in due time. (468)

It is next contended, he has title under the act of limitations. 1715, *ch. 27, sec. 3* “No person nor persons, nor their heirs, which shall hereafter have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title which descend or accrue; and in default, he shall be utterly excluded and disabled

Apr. 1797. from any entry or claim thereafter to be made." The act of limitations was made to quiet disputes arising between different patentees of the same land, and those claiming under them. It supposes the land to have been already appropriated. It never speaks when the question concerns vacant lands. The preamble shews, it was never intended to operate against the King or the Lords Proprietors. The right or title to be barred by a neglect to enter within seven years, is a right or title which by the common law may be preserved by entry—a *jus possessionis* derived under some grant of appropriation—a right totally distinct from the *jus pre-emptionis* created by the entry laws. The latter is acquired by the circumstances mentioned in the entry laws, and is lost by not being executed in due time. The former is acquired originally by grant actually issued, and is continued and transmitted down by mesne conveyances or descents, and may be lost by seven years adverse possession of another. The land now in dispute never was appropriated, and therefore, neither of the parties can acquire or lose any right under the act of limitations.

It is next argued, that the caveator has title under the act of 1791, *ch.* 15. "Where any person or persons, or those under whom he or they claim, shall have been or shall continue to be in possession of any lands, tenements or hereditaments, under titles derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by endorsement of patents or other colorable title, for the space of twenty-one years, all such possessions under such titles, shall be and are hereby ratified, confirmed and declared to be a good and legal bar against the entry of any person or persons under the right or claim of the State, &c. provided the possession so set up, shall have been ascertained and identified under known and visible lines and boundaries." Before this act, persons whose lands had been actually surveyed and marked, and who had obtained patents which had been lost, and no registration of them to be found, were liable to be turned out of possession, and in some instances, had actually lost their lands by persons who entered claims for them as vacant lands, though there was every reason to suppose from the length of possession, and from the visible boundaries claimed, that the lands had once been appropriated. The act of

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limitations was no protection to such persons, and justice Apr. 1797. required for their safety, that some length of possession under such circumstances should be taken as evidence of a former appropriation and grant—and should bar the State and those claiming under it; to this end the act was made. It never applies, but where the circumstances of twenty-one years possession, and known and visible boundaries, induce a presumption of a former grant. This act is bottomed upon that presumption. It operates upon the supposition of a former grant now lost, and not otherwise. In the present case, it is admitted on both sides, that the lands in dispute are vacant lands—they cannot therefore be a subject for the operation of this act. and consequently the caveator can have no title under it.

Anonymous.

Mr. Norwood moved upon an affidavit filed, stating the evidence before the Justice of the Peace, and shewing his judgment to have been illegal, for a writ of *recordari*, to bring the proceedings into this court.

HAYWOOD, Justice—A writ of false judgment, is a writ of right, and we cannot deny it. It is like a writ of error which the party may bring without leave of the court.

STONE, Justice—The writ of false judgment and the writ of *recordari*, are not the same. When a *recordari* is moved for, I think we have power to refuse it.—*Sic adjournatur*.

NOTE.—The case of *Brickell v. Byrd's* administrators, which was a suit before a Justice of the Peace, who had given judgment, removed into the Superior Court of Halifax, by writ of *recordari*, was brought on and argued in April term, 1797, but not decided, owing to a difference in opinion between Judge WILLIAMS and Judge MACAY. *Whyte*, for the Defendant, moved for an issue to be made up, and the cause to be tried by a jury. *E contra*, it was argued, that the different modes of bringing up proceedings from inferior courts not of record, are *pone*, *recordari*, false judgment, and *accedas ad curiam*. 3 *Bl. Com.* 34, 37, 149. The two latter being the same in their object to review the matter in law. *Fitz. Nat. Br.* 38, *A & D*. The two former also to try the matter of fact. *Fitz. Nat. Br.* 160, 162. Both issue to courts not of record—their difference results from the different modes of commencing by writ—the *recordari loquelam*, being appropriated to the removal of proceedings commencing without writ. In either case the Superior Court proceeds on the *plaint*, not on the *pone* or *recordari*.—*Fitz. Nat. Br.* 160. Note *a*. and either Plaintiff or Defendant may remove the proceedings by these writs for good cause; but then these writs always issue before judgment. A *recordari* will not lie after judgment, for the purpose of a new trial. And as the writ in the pre-

Apr 1797 sent case was issued after judgment, there can be no trial of the facts upon it. *E contra*—Writs of false judgment and of error, are for the same ends, to revise erroneous judgments—the first lying to a court not of record, the other lying to a court of record. So also the writs of *recordari* and of *certiorari*, are for the same end, to have a trial *de novo*—the former lying to courts not of record, the latter to courts of record only. *Fitz. Nat. Br.* 164. 1 *Bac. Ab.* 559. Then the doctrine of our courts respecting *certiorari*, all apply to *recordari*—the object of each is rendered a little different here from what it is in England; there the *certiorari* is used almost always for taking up proceedings before judgment, here, most commonly after—why not also apply the *recordari* to the purposes of new trials after judgment, as well as the *certiorari*? If it be said the writ of *recordari* and false judgment, are the same, then there are some writs to bring up proceedings for error in law, none to rectify errors in fact; there will be no means of getting redress in cases of improper decisions before Justices of the Peace, even in such cases, where the Justice is a party, the statute of gaming is pleaded, or the like, which Justices ought not to try; or where the party is unable to get sureties for an appeal; and besides all this, this is an attempt to overturn a proceeding, which has been constantly used for six or seven years, now last past. Judge WILLIAMS said, there might be a new trial after the proceedings were removed by a *recordari*, if justice required it. Judge MACAY, there cannot.—*Sic adjournatur*.

NOTE.—The writ of *pone*, is to remove a *plaint* commenced by writ in the County Court, which is a court not of record, into the Superior court, when it is apprehended a fair trial will not be had in the court below; and when it is removed by the Defendant, the cause is put in the writ. When the *plaint* is in the County Court without writ, and is to be removed, a *recordari*, properly so termed, issues, commanding the Sheriff to record the *plaint*, and return it; here also, the Defendant must assign cause. If the *plaint* be not in the Sheriff's court, but in some other inferior court not of record, then the *accedas ad curiam* issues, commanding the Sheriff, that he go to the court and cause the *plaint* to be recorded and returned. All these writs, when issued before judgment, are for the same purpose—to have a fair trial in the Superior Court; but they have different names, for reasons peculiar to each. Where the *plaint* commences by writ, and is already in writing, the Sheriff has nothing to do but to bring (or put) it into the court above; and therefore he is not commanded to record. When the *plaint* is not by writ, but is already in a court where he presides, he need not go to another court to record it; and therefore, he is commanded simply to record and return it. But when the *plaint* is without writ, and in another court, where he does not preside, then he must go the court and record it. Each writ takes its denomination from the principal act or acts the Sheriff has to do, but the proceedings in all of them are exactly the same, when once removed before judgment—the parties proceed to a trial of the facts. If the complaint be of a false judgment rendered in the court below, then a writ of false judgment issues, commanding the Sheriff to go to the court below and record the *plaint*, &c. if in a court where he did not preside; or simply, to record the *plaint*, if in a court where he does preside; so that in fact, the *recordari* and *accedas ad curiam*, is the first process in the writ of false judgment. The *recordari* is not the commencement of any specific suit, but is a process common to several cases, like a *capias* in other suits, and is used indifferently for the pur-

pose of bringing up proceedings, either before or after judgment, and either for the purpose of having a trial on the facts, or for examining whether there is error in the judgment in order to its removal. The only use of the *recordari* (either that properly so termed, or of the *accedas ad curiam recordari*) is to bring the proceedings into court, in the same manner as the only use of the *certiorari* is to bring the record into court; and as the *certiorari* has been used by our courts for one more purpose than it was used in the English courts, owing to the peculiar situation and construction of our courts, namely, for the purpose of obtaining a new trial in the court above; and as there is the same reason and necessity for carrying the *recordari* one step further also, to prevent a defect of justice, it may be concluded that the *recordari* may be as well converted to that use as the *certiorari*. Why shall it be said we will extend the *certiorari* to other uses than it was formerly employed for, and not the *recordari*, when the reason and necessity for so extending it is equally urgent in the latter, as in the former case? If the Justice refuse the party his appeal, or if the party is injured and cannot find sureties for his appeal, or if he offers sureties and they are rejected upon pretence of insufficiency, or if the Justice is a party concerned, or acts otherwise corruptly, oppressively or injuriously to the party, he can have no redress whatever, unless this writ is allowed to lie for the purposes contended for by *Byrd's* counsel.

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State v. Curtis.

Per curiam—If a justice of Peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it; but if it be for a matter not within his jurisdiction, the officer ought not to execute it.

2d. If the officer be a known officer of that district in which he is acting, he need not shew his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to show his warrant if demanded.

3d. When he makes the arrest, he should briefly inform the party arrested of the cause—as I arrest you at the suit of A. or in behalf of the State—otherwise the arrest is not good. 6 *Rep.* 54. 9 *Re.* 68 b.

4th. That if a warrant want any circumstance essential to its legal form or constitution, as if it want a seal, it is void, and will not justify the officer in making the arrest. 1 *Hale* 577. *Foster* 311 312. And as the officer did not tell *Curtis* for what he arrested him, and the warrant he had was not under seal, *Curtis* who resisted, and beat him for making the arrest, was acquitted.

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Hogg's Executors v. Ashe.

Unliquidated damages cannot be set off, but when they are reduced *in rem judicatum*, they may be. In an action brought by two partners, a debt due from one of them, cannot be set off, but if one of the partners dies, then in a suit by the survivor, a debt due from him, may be set off. When a chose in action is assigned for value received, no debt contracted subsequently shall be allowed even at law as a set off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name.

(472) Debt upon bond. Pleas, general issue, notice of set off, payment at and after the day : and now upon the trial it appeared on the part of the Plaintiffs, that prior to the year 1778, *Robert Hogg*, now deceased, and *Campbell*, were partners in trade—that *Hogg* died, and in 1778, the Defendant being indebted to the firm of that company, gave the bond in question to *Campbell*, the survivor—that in 1780, *Campbell* for valuable consideration, by deed assigned all his share and interest in the partnership effects and debts, to *James Hogg*, the principal legatee in the will of *Robert*, and some time after joined the enemy, and was thereby rendered incapable of carrying on suits at law : and in 1786, the Legislature passed an act, taking notice of the assignment, and of *Campbell's* disability, and that it was injurious to the creditors, and vested the right of suing for the partnership debts in the executors of *Robert Hogg*, making them also liable to actions, on account of debts due from the partnership—in 1789, the Defendant recovered against *Campbell* £500 for negroes of the Defendant, carried away by *Campbell* when he joined the enemy. The Plaintiff produced the bond, the deed of assignment, and the act of Assembly, and there rested his case. The Defendant then offered the judgment recovered by him against *Campbell*, as a set off ; which was objected to, by *Williams*, for the Plaintiff. He argued, that all uncertain damages, all unliquidated demands which are sound in damages only, are in their nature incapable of being set off—only such demands for which debt, or *indebitatus assumpsit*, will lie, can be set off. One principal requisite to a debt in order to its being set off, is, that it should be mutual. *Cow.* 56.—*Iredell* 172, and these debts are not mutual ; the judgment offered to be set off is obtained against *Campbell*, *in jure proprio*, for a transaction no ways relative to the partnership concerns, and which arose after the death of the

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other partner, and the consequent dissolution of the partnership; whereas the debt sued for, is a debt contracted with the partners as joint merchants. Mutuality of debts is so absolutely essential to a set off, that no instance can be produced, of a set off having been allowed, where the debt demanded is not due to the same persons precisely as the debt to be set off is due from. Even a debt due to a man in right of his wife, cannot be set off in an action against him for his own debt, *Bull.* 179, because not precisely mutual; the debt sued for being due from himself alone, and that offered to be set off to him and another—the reason of the rule is, lest the interests of third persons might be affected. If the husband in the case cited, is compelled to sue for the debt due in right of his wife, that debt would survive to her in case of his death before the recovery; that reason extends to the case before us. Were this judgment allowed to be set off, the interest of the representatives of the deceased partner who remained here, would be subjected to pay a judgment recovered against *Campbell*, for a tort of his own. If one man receive rents for another after his death, by appointment in his lifetime, and then be sued by the executors, he cannot set off a debt due from the deceased, because the deceased never had any cause of action against him. *Bull.* 180. So here, the Defendant never had any cause of action against the Plaintiffs, and ought not to be allowed to set off the judgment against them. It is true indeed, that by the death of *Robert Hogg*, the remedy to recover the partnership debts survived to *Campbell*; but it was the remedy only that did so—the interest of the deceased did not. It is a rule in the law merchant, that *jus accrescendi inter mercatores locum non habet*. 4 Term 123. 5 Bac. Ab. 580, 589. That interest which *Robert Hogg* had survived upon his death to his executors, though the right to recover them, and get them in from the partnership debtors, survived to *Campbell*, who could not, by any transactions of his, onerate the share of his deceased partner with any other incumbrances than it was subject to at the time of his death. As to the share of *Campbell*, though that might have been liable had no assignment been made, yet seeing his share was assigned, and that assignment confirmed by act of Assembly before the judgment against him, it passed to the assignee (being for a valuable consideration) not subject in his hands, to this demand; and this set off is not proper to be allowed.

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Davie for Defendant—I shall not deny the law as laid down by *Mr. Williams*, that unliquidated damages cannot be set off; but my answer to that part of his argument is, that the debt we offer to set off, is not unliquidated, but reduced to a certainty by the judgment. It is needless to consider particularly, the cases adduced by *Mr. Williams* in support of this position, they are all of them cases of uncertain demands, and do not apply to the present case. If it be said, that before the judgment the demand was for damages uncertain; the answer is, whatever may have been the origin of a judgment, whether trespass or any other injury to be compensated in damages, when the damages are once ascertained by the verdict of a jury, and a judgment given for them, they become from thenceforward a debt, as much as if a bond had been given for them; and may be sued for and recovered in an action of debt. *Espin. Hontel v. Strickland*. And wherever the sum offered to be set off, is properly recoverable in an action of debt, it may be set off: every set off being in lieu of an action. As to the mutuality of

(474) debts in order to a set off, that also is necessary: but then as we are in a court of law, the legal interest is only to be considered. The assignment at most, only vests an equitable interest in the assignee: and that is such an one as this court will not take notice of. The interest assigned in the hands of the assignee, is legally subject to all the incumbrances, it was subject to, or would have been subject to in the hands of the assignor, had the assignment not been made. The share of debts assigned, is still legally considered as debts due to the assignor.—Had *Campbell* after the assignment, committed high treason, the debts assigned were subject to forfeiture. In short, the assignment as to third persons, operates nothing—the law will not recognize it. Notwithstanding the assignment, suits must still be brought in the name of *Campbell*; the law deeming it a mere nullity. The assignment therefore, so far as regards the legal interest of the parties, leaves them exactly in the same situation they were in before the assignment: and then a judgment recovered against *Campbell*, may be set off against a debt to be recovered by himself; and laying aside the act of Assembly, that is the present case. That act for the furtherance of justice, has vested the right of suing in the executors of the deceased partner; but still the debts

when received, do in contemplation of law belong to *Campbell*. The executors are the representatives of the partnership by Legislative creation, and in the place of the surviving partner acting for the partnership, and are subject to all such actions as the person in whose place they stood was; and of course to an action for this debt, and consequently to the set off offered; which is no more than a cross action by the Defendant against the Plaintiff.—
 In this view of the case, both the interest of *Campbell*, and *Campbell* himself, by his representatives the executors, are now before the court. This is substantially and properly to be considered as the action of *Campbell*, to recover a debt the law deems due and payable to himself, both now and when recovered; and therefore, the debt sued for, and that offered to be set off, are reciprocal and mutual debts within the meaning of our act of Assembly, and are perfectly clear of the objection endeavored to be raised by *Mr. Williams* for want of mutuality. It is not so universally true as is stated by *Mr. Williams*, that the debt to be set off, must be a debt recoverable by the Defendant against the Plaintiff. *Esp.* 240. 1 Term 112, 115. I much doubt whether the case cited from *Buller* 179, would be so adjudged at this day. It certainly could not have been so adjudged to save the right of survivorship to the wife. 5 Term 493, proves that a debt due from a surviving partner, may be set off in an action brought by him for a debt due to the partnership—there was not such precise mutuality as *Mr. Williams* contends for—that was the very same case as this now before the court. In the present case, the whole partnership interest is yet in *Campbell* the survivor, and the suit for his benefit; at the same time that the debt sought to be set off, is reduced to certainty by a judgment against that very surviving partner. The assignment operates nothing, the act of Assembly appoints a substitute for *Campbell*, with respect to the remedy. If these two latter circumstances create no difference, as I think they do not, the present case is precisely similar to that last cited, and ought to be governed by it; for as to the origin of the debt, that is of no consequence whatever. 3 Term Rep. 507. The law only requires mutuality of action, and certainty as to the amount of the debt to be set off. If this set off is not allowable, a general inconvenience will follow, for then a partner may contract debts, commit tres-

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Apr. 1797. *pass, &c.* and before a recovery can be had against him, assign his share to the legatees or executors of his deceased partner, and put it out of the power of his creditors to obtain a farthing.

Williams in reply. 3 *Bac. Ab.* 589, proves that the right of survivorship does not take place amongst merchants; and from thence it follows, that the share of *Robert Hogg* could not be affected by this judgment. And then surely it follows, that it cannot be affected by setting off this judgment against its debts. If the set off contended for be allowed, it will defeat his interest or share of this debt; and by the same reasoning, a surviving partner by his misconduct, may destroy the whole share of his deceased partners. This is incompatible with the rule, and cannot be law: a partner by contracting private debts, cannot affect the whole partnership. When there is a judgment against him, and execution issues, the Sheriff can only sell his share, so as to make the vendee a tenant in common with the other partner. *Salk.* 392. If the whole cannot be affected by an action, neither can it by a set off; and consequently a private debt as this is, cannot be set off against a partnership debt, when you cannot take from any part of it by a set off without affecting the interest of the other partner. He cited 4 *Term* 123. As to *Campbell's* share, admitting it to have been liable to this set off had no assignment been made, yet as it actually was made and confirmed before the recovery of this judgment, it is in the same situation as if it had been the transfer of an interest legally assignable; such as a note of hand or the like, which clearly would be exempt from any after debt due from the assignor; and consequently no part of these effects and debts, neither the share of *Campbell*, nor of the deceased, can be any ways liable to this demand of the Defendants.

Judge HAYWOOD—In 1778, the bond was executed upon which this action is founded; in 1780, the surviving partner assigned all his interest in the partnership effects; in 1786, the act of Assembly passed, and in 1789, the Defendant recovered this judgment which he now offers to set off. The best way of ascertaining whether a demand may be set off, is to consider in the first place whether it is such a demand in itself, and of its own nature, as may be set off—secondly, against whom it may be set off. A demand for unliquidated damages, cannot be set off: the

Legislature never could intend to introduce so much confusion, as that of trying actions of trover, trespass or the like, by way of set off in an action of debt. Had the Defendant's demand been for damages, or any unliquidated sum, I should have been very clearly of opinion it could not be set off; but it is not for unliquidated damages—it is for a sum certain, reduced in *rem judicatam*, by the judgment. It is therefore in itself and of its own nature, capable of being set off, whatever may have been its origin; and although before the judgment it might have sounded only in damages. The true question is, can debt or *indebitatus assumpsit*, be brought upon the demand offered to be set off. If it may, then the sum is such an one as may be set off. Here, debt would lie upon the judgment, and therefore it is capable in itself of being set off. With regard to the party against whom it may be set off, I take the distinction to be this—where the debt offered to be set off, is recoverable and payable out of the same fund, that the debt to be recovered in the action goes to increase, it may be set off. Where two Plaintiffs sue, and the sum offered to be set off can be recovered of one of them only, it cannot be set off; or where one sues, and the sum offered to be set off is due from that one and another, it cannot be set off; because in either case, the two actions cannot be reduced to one by a set off, without doing an injury to a third person, by subjecting him to the effects of an action, to which before the act of set offs, he would not have been subject. The act did not mean to extend the action of the Defendant to a person not liable to it without the act; but only to give him the effect of an action against the Plaintiff, to which the Plaintiff was liable without the act, but not subject to by way of set off. The law is so with respect to a partnership dealing; the Defendant cannot, by execution upon a judgment against one partner in his private capacity, seize and sell the whole partnership effects: he can only sell the share of the partner against whom he has judgment, and the vendee becomes tenant in common with the other. If he cannot affect the other's share by judgment and execution, surely he cannot do it by set off; which is in lieu of an action. The law is so stated in *Salk.* and several other books, and this is the meaning of the case cited by *Mr. Williams*, from *Term Re.* but all this goes upon the supposition, that the two partners are alive, and both sue. The case is widely different where

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Apr. 1797. one dies, for then the survivor has all the partnership effects in *jure proprio*. He may release the debts, give away the effects, sell and dispose of them to whom he pleases ; he alone can take possession of all the effects. The executors of the deceased cannot object to any disposition he may think proper to make ; they cannot lay claim to any particular article ; they cannot sue as vendee or donee, and recover the effects. When an action is brought for the partnership debts and effects, he sues in *jure proprio*, naming himself by his proper name without the addition of surviving partner, and states his right in the declaration. The maxim cited by *Mr. Williams*, is a true one ; but it is not to be understood as he understands it ; it means, that the interest and property of the deceased does not cease as to him, and become vested in the survivor, as in the case of other joint tenants ; but that there survives to the representatives of the deceased, a right to demand the deceased's share of the clear balance that shall remain, after the debts due to and from the partnership shall be collected and paid by the survivor. Their claim is to an account, and for the balance in money ; not to any specific articles or debts of the partnership. The survivor is their debtor, and they his creditors to the amount of the balance ; therefore when he sues a partnership debtor, he sues in *jure proprio* ; and that debtor, if he has a demand against him in his private right, may set it off : and that is the reason of the case in 5 Term 493. If *Campbell* were the Plaintiff here, and the assignment had not been made, this debt might be set off. Then what effect has the assignment ? In this court, by the rules of the old common law, it has no effect. A chose in action cannot be assigned, it vests no legal interest in the assignee ; but then the act of Assembly comes in and legalizes the assignment, and gives it the effect of legally vesting the whole interest the assignor had in the assignee ; and that assignment having been prior to the Defendant's recovery, exempts the effects in the assignee's hands from the after incumbrances of the assignor. From the time of this act, *Campbell* had neither an interest in, nor a remedy for this debt—he could not now sue for it were he in the country, and if his interest has so completely departed from him, that he has no control over the debt, nor can institute nor release any suit for it, then he and his property is liable to the Defendant's action upon the judgment, and the Defendant

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is liable for the bond to the action of other persons, whose recovery will go to increase the fund of the assignee, which is not liable to pay the debt due to the Defendant; and consequently, the Plaintiff's are not such persons against whom the Defendant's demand can be set off. Apr. 1797.

STONE, Justice—I am of the same opinion with Judge HAYWOOD as to the principal point, that this set off ought not to be allowed.

Davie for the Defendant—The opinion of the court proceeds entirely upon the effect of the act of Assembly. I did not foresee this, and hope I shall be indulged with another argument. I can shew very clearly that the act has not the meaning given to it by the court.

Per curiam—Let the case be specially stated—We will hear another argument. It was so stated, and afterwards at another day in the term, the cause was again argued.

Davie for the Defendant—It was argued the other day by the Plaintiff's counsel, that where partners sue, a debt due from one of them only, cannot be set off. That is not denied, but it will not from thence follow that where the surviving partner sues, a debt due from him may not be set off. The law is, that it may. The court knows no right but his—he is answerable to the executors of the deceased for the debts due to the partnership—it is perfectly immaterial to them how he disposes of these debts—whether by discharging his own private debts or otherwise. In case of a debt due from him in his private capacity, if he is sued for it, and execution issues, it will take hold of all the partnership effects, and they may be all sold to satisfy it. There is no moiety of his, distinct from that of the dead partners; there is no longer any partnership existing. 3 Term 493, is in point. The surviving partner may join a partnership action, and one in his own right, in the same writ; which proves both actions to be in *jure proprio*, and therefore the law will allow a debt due from him to be set off in such action.

The liability of the survivor to the executors of the deceased, is no argument against it; neither is it any hardship that the partnership effects should be liable to the debts of private creditors, to the prejudice of partnership creditors, who it is said trust upon the credit of no particular fund, but from his personal credit generally. According to Mr. Williams' own argument, a private creditor may sell a share of one partner, to satisfy his pri-

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Apr 1797. vate debt ; then why not the whole partnership effects, when concentrated in the hands of the survivor. It is no hardship, for a debt due to the partnership may be set off by the survivor, against a debt due from himself. I think it cannot be doubted, but that the surviving partner holds in *jure proprio*, and that an execution for a debt due from himself, may be levied on the whole partnership effects to satisfy it. As to the act of Assembly, it is in derogation of the common law, made for a special purpose, to answer the convenience of particular individuals, and ought to be construed strictly according to its literal meaning.— 5 *Bacon's Abridgement* 650. 10 *Modern* 182. [Here he read the act of 1786, *ch. 56*] By this act those persons who were the executors of *Robert Hogg*, are empowered to sue, naming themselves executors of *Hogg* ; but they do not sue as executors—they are put in the place of the surviving partner, they represent him, they are enabled to recover for the purpose of paying the partnership debts, not for the purpose of paying over to the assignee. They are, for ought that is contained to the contrary in this act, to pay the balance to such persons as by law are entitled to receive it, and that is the surviving partner—they can only recover in cases where he might, were he not disabled—and are subject as he would be, were the suit in his name.

(480) *Williams*, in reply—The reason of allowing a set off in the case of an action against the surviving partner is, because he may recover the partnership debt, and pay his own private debt with it ; but if he sues, the court will not compel him to admit the set off of a debt due from himself in his private capacity. It is at his election when Defendant, to set off or not. He may dispose of the partnership debts in discharge of his own private debts if he thinks proper, but the law will not force him to do so. It will not compel him to do injustice by breaking the trust reposed in him by his partner at the time of commencing the partnership. He then cited 2 *Vern.* 293, 706. *P. Wil.* 182. 4 *Term* 123, to shew that in cases of bankruptcy, the partnership debts shall be paid out of the partnership effects before the private debts of the partners. Partnership effects in the hands of a surviving partner, cannot be taken to satisfy a private debt by execution. A Court of Equity would protect the share of the deceased partner, upon proper circumstances laid before it. The Defendant in the present case, had notice

of the assignment by *Campbell*, and a payment made by *Apr. 1797.* him to *Campbell* afterwards, would not have been allowed. The act of Assembly recognizes the assignment, and imparts to it a legal effect and operation. With respect to assignments in general, they are protectable in a Court of Equity, and no payment made after notice of an assignment for valuable consideration, shall defeat the interest of the assignee. 1 *Salk.* 79. 1 *Atk.* 294. 2 *Bl. Re.* 1269, 1137. 1 *Term Re.* 26. 4 *Term* 340.

Curia advisari—A few days afterwards, *STONE* delivered the final opinion of the court, that the set off was not allowable, and added he would give his reasons.—The idea, he said, of the unassignability of *choses in action*, is much altered now from what it was formerly.—Courts of Equity for a long time have protected such assignments when for valuable consideration. Courts of Law also have lately come into the resolution of taking notice of them; and very properly: for why should a Court of Law refuse to do what is really just and proper to be done, and what is usually and every day done in a Court of Equity? Many of the ancient common law rules have been changed, merely because they would not do that which Courts of Equity would. Accordingly Courts of Law now view the assignor of a *chose in action* for a valuable consideration, as a trustee for the assignee; and the thing assigned is really and substantially belonging to the assignee. One consequence resulting from this is, that a *chose in action* actually assigned for value is not liable to the after charges of the assignor, especially where the third person has notice of the assignment, and of course not to a set off of a sum subsequently becoming due from the assignor. My opinion is founded not only on the reason and propriety of the thing, but also upon a case in 1 *Term Re.* 619, and the cases there cited, where the doctrine I am treating of, is fully established. The law of these cases has been recognized by several decisions in our own courts—by that of *Smith and Powell*, decided at Halifax, on the last circuit; and by that of *McDaniel and Tate*, decided at Morganton, some years ago. (481)

It is said however, that these cases proceeded upon fraud; but is not every case of a fair assignment for value, attempted to be defeated by the assignor to the prejudice of the assignee, a case of fraud? I think this mo-

Apr. 1797. *den doctrine respecting choses in action assigned, more peculiarly proper here, because our Courts of Law and Courts of Equity are united, and both jurisdictions to be exercised by the same Judges. It seems very idle to give a judgment at Law, merely for the purpose of setting it aside or correcting it in a Court of Equity. It is more proper, because much less expensive and dilatory, for the Court of Law at once to make the same decision that is attainable by an application to the Court of Equity. I am also of opinion, the act of Assembly meant to give efficacy to the assignment. It has certainly given the right of suing to the present Plaintiffs; and if they are only Plaintiffs in form, as there is no instance of pleading a set off against a person who is not Plaintiff on record, I think that circumstance alone, independent of any consideration respecting the interest, sufficient to oust the Defendant of the set off he proposes to make. As to the doctrine of set offs, with respect to the quality of the demands capable in themselves of being set off, and the persons against whom they may be set off, I am of opinion, the law was accurately stated the other day from the bench.*

The set off was disallowed. Then *Williams* moved for a new trial, the jury having not allowed interest enough, and being not opposed, it was granted.

NOTE. — *Vide S. C. Con. Rep. 1. Wofford v. Greenlee, Ibid. 79. Roberts v. Jones, 1 Murph. 353. Noble v. Howard's Ex'rs. 2 Hay. 14. — Smith v. Powell, ante 452.*

FAYETTEVILLE, APRIL TERM, 1797.

Anonymous.

Per Curiam.—The Defendant, the administrator, has not distinguished in the inventory, the good from the bad debts. We must take if they are all good debts, but you may discharge him (speaking to *Mr Taylor*,) by proving suits for them, and that the debtors were unable to pay. The Constable who had served the warrants, and had the executions in his hands, was now dead, and *Mr. Taylor* could not prove insolvency in the debtors, and his client was charged with all the debts mentioned in the inventory. The administrator, in returning his

inventory, should have said these debts are sperate, and I allow myself to be charged with them when recovered, these are desperate; and then he would not have been charged with them unless recovered; but when he gives an account of debts in his inventory, and says nothing about them, it is an admission in law that the debts may be had by demanding them of the debtor. (482)

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NOTE.—*Vide Bull. N. P. (Brid. Ed.) 140, a.*

Spiller v. Spiller.

This was a bill filed by *Mrs. Spiller*, for alimony; and her counsel now moved, that so much of his property might be taken, as would probably equal the decree of the court, saying *Mr. Spiller* was wasting his property.

Per curiam—We have ordered sequestrations of this kind, when we have found the Defendant withdrawing his property, or being about to move it and himself to avoid an execution of the decree; but not otherwise. It would be a great stretch of power in this court, to order a sequestration, or a bond for the absolute performance of the decree, whenever a bill is filed against a man by one who claims to be his wife.

NOTE.—*Vide Anonymous, ante 347.*

Anonymous.

This was a bill to foreclose a mortgage. *Cochran* was mortgagor—he sold one moiety of the premises to *Huitt*, and his partner, in fee—their title came by a Sheriff's sale to *Spiller*. The mortgagee had a decree of foreclosure, unless before a certain day the money was paid.—That day was past, but no absolute decree of foreclosure yet entered. *Spiller* moved to be made a party, and to have the decree so altered, that he might be at liberty to pay the money for saving his equity of redemption.

Per curiam—Let *Mr. Spiller* be at liberty to file a bill, stating his interest, and praying the decree may be so varied as to let him in to pay the money. It would be unjust to foreclose the equity of redemption, and bar his title to his moiety, which he acquired fairly, without putting it in his power to prevent the foreclosure by paying the money.

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State v. Moore.

Confessions whether extorted, or not, that relate a number of circumstances, all of which are proved by other testimony actually to exist, are admissible against the prisoner.

(483) Indictment for murder, and not guilty pleaded. Upon trial, it appeared the body was found near Wadesborough; and as the deceased and Moore were seen together a few days before, the suspicions of the neighborhood fell upon him. Two men pursued him, and in the neighborhood where he resided, met him in an old field, returning home from the house of a neighbor. They tied him, and ordered him to produce the deceased's money; he produced some immediately, and promised to carry them to the place where the residue was. He carried them into a swamp, and shewed the residue. They struck him when they first met him, for denying that he had killed the deceased. Upon which he owned it, and said he struck him with a hickory club, standing on his left side as the deceased rode along the road; that he dragged the body out of the road, and left the club lying by it; that he covered the body with brush, in a place where the road formerly ran, about ten or twelve yards from the present road. These circumstances were all now proven to be true, and actually to have existed as he then represented them. He promised to show them where the saddle-bags and cloaths of the deceased were; and about four miles from the place where the body was found, he pointed to a log lying not far from the road, and said the bags were in that; the witness went and found the bags there, and the cloaths of the deceased, and produced them now in court; and they were proven in court, to be the bags and cloaths of the deceased.

The prisoner's counsel objected, that there was no evidence in the present case to affect the prisoner, without the aid of his confession. The money, the club and the bags, are only of weight, as they correspond with the confession; and by that means prove a consciousness and knowledge of the principal fact, whence is inferred the guilt of the prisoner. The confession in the present instance, ought not to be received as any part of the evidence against the prisoner—it was extorted by violence, and ought not to have been heard; and having been heard improperly, it ought to be rejected, and then there is no proof against him.

Per curiam—A confession extorted and uncorroborated Apr. 1797. by circumstances, weighs nothing ; but a confession whether extorted or not, that relates a number of circumstances which the prisoner could not well be acquainted with but as perpetrator of the crime, all which circumstances are proved by other testimony, to have actually existed, is such testimony as should be left to the consideration of a jury. That is the nature of the confession in the present case ; and upon such testimony, if the jury are satisfied with its truth and sufficiency, they may find the prisoner guilty. They should be very cautious however, and examine every circumstance with the most critical nicety before they do so. The jury found him guilty, and he had judgment of death.

NOTE.—In this case, the saddle bags were pointed to voluntarily.—Also, part of the money produced, before any blow given.

NOTE.—*Vide 1 Phil. on Evid. (3d Am. Edit.) 89. State v. Long, ante 455. State v. Roberts, 1 Dev. Rep. 259.*

Wilcox v. ———. [*S. C. ante 223.*]

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A surveyor and jury, who were appointed under separate orders in several distinct suits, shall be paid full costs in each suit, although from the locality of the lots sued for, the same labor answered for all the surveys.

There were several ejectments against several persons, who were settled on lots in the town of Fayetteville claimed by the Plaintiff, who alleged them to be included in a tract of one thousand acres adjoining the town. A jury and surveyor were appointed in each of the suits, by distinct orders made in each, for the purpose of ascertaining where the line of this thousand acre tract really was. After the trial, a question arose relative to the costs of the jury and surveyor, whether, as they were the same jury and surveyor, they should be allowed in each of the suits, or only in one. In other words, whether they should be allowed single or double wages. It was reserved for several terms, Judge MACAY saying, he would search the records of a similar case decided at Salisbury, where this question was decided : and now the court decided, that they were to be allowed in each of the suits ; the surveyors were to return plats in each, the jurors to attend in each. Had one suit been determined, the juror must have attended in the others ; just in the same manner as a witness summoned in several

Apr. 1797 distinct suits, is entitled to wages in each, though they are all tried on the same day.

NOTE.—A witness summoned by each party is entitled to compensation by each. *Peace & Kittrel v. Person & Gordon*, 1 *Murph.* 188.

Anonymous.

The plea of *plene administravit* shall be received at all times, provided the Defendant does not come in with it at a very late period, to delay the trial.

This suit had come from the County Court by appeal; which was taken for this cause, that after the suit had depended for some time upon the general issue, the Defendant's counsel moved to put in the plea of *plene administravit*; which was opposed there, and now at the bar of this court, because if the plea could be now put in, the consequence would be, that a Defendant might administer his assets after being served with process, and then come in and defeat the Plaintiff by such a plea.

Per curiam—*Plene administravit*, whenever put in, relates to the day of service of the writ; at least it must state, that on the day of exhibiting the Plaintiff's demand by writ, the Defendant had fully administered; or at least that the writ was first served on such a day, before which day he had no notice, and that before that day, he had fully administered, &c. This plea should be received at all times, provided the Defendant does not come in with it at a very late period, and thereby delay the trial; otherwise the Defendant might be subjected to pay the debt out of his own estate, when perhaps he had in fact no goods to be administered on, wherewithal to pay it. The plea was admitted.

NOTE.—*Vide Sawyer v. Sexton's Adm'r.* 2 *Hay.* 67. *Reid v. Hester*, *Con. Rep.* 488.

(485) Barges, by her Guardian, v. Hogg.

A plea in abatement, that the Plaintiff is an alien, is not sustainable in the action of trespass *quare clausum fregit*.

Trespass, *quare clausum fregit*; and a plea in abatement that she is an alien, and demurrer thereupon. After argument by *Williams* for the Defendant, and *Hay* for Plaintiff.

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Per curiam—An alien cannot maintain ejectment, or any action for the recovery of a freehold. Aliens are not allowed to acquire real property; but if an alien has purchased real property, and is in possession of it, the purchase is good, and will be for the benefit of the public, whenever the State thinks proper to exert its right, by causing an office to be found; but before such advantage is taken, no individual can interfere with the freehold, and violate the possession of the alien purchaser. His possession is lawful as to all persons but the State, and he may demand damage for the violation of it, in a personal action. Wherefore, let the Defendant answer over. See *Dyer* 283. 5 *Re. 52 b. Terms de ley, Verbo alien. Co. Litt. 2. Leonard* 61.

NOTE.—In this case the lands were purchased by the Plaintiff's father, who was a citizen, and died leaving the Plaintiff, his daughter, residing in Great-Britain: in which case, it seems, the freehold is cast upon the State, as the law will not allow the alien to inherit, and differs from the case of the purchaser who may take and continue possession till an office entitles the public. 1 *Bac. Abr.* 81.

NOTE.—*Vide* *doe on demise of Blount v. Horniblow*, 2 *Hay.* 37.

Anonymous.

This was a special case, in which it was referred to the court to decide, whether or not an action on the case upon assumpsit, would lie for the use and occupation of a house. The declaration stated the use and occupation, and a promise to pay. *Mr. Hay* cited 2 *Cro.* 596, 668, 684. *Cro. El.* 118, 859. *Cro. C.* 414.

Per curiam—An express promise, by all the books, will support this action—some of them say, an implied promise will not, because debt for rent is the assigned action—the promise here stated, may be taken to have been an express one, as the contrary is not stated in the special case. The Plaintiff had judgment.

Judgments have been given for the Plaintiffs upon a *quantum meruit*, before the *II. Geo.* 2, c. 19. *Vide* 3 *Mo.* 73.

NOTE.—*Vide* *Hayes v. Acre*, *Con. Rep.* 19.

Tuton v. the Sheriff of Wake.

If the Sheriff returns an escape to a *capias ad respondendum*, he may be sued for the escape, and not be proceeded against as bail.

To a *capias ad respondendum*, he returned an escape; and this was an action for the escape.

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HAYWOOD, Justice—In England, an action will lie for an escape on mesne process, whether the escape be voluntary or negligent; for there, when the Sheriff has taken the body, he must produce it, or return a bail bond; and if he has him not at the day assigned by the writ, he fails in his duty: but here, the Sheriff may if he pleases, permit the party to go at large, and become his special bail under the act of 1777, *ch. 2, sec. 16 & 76*—so that here perhaps, it is not an escape subjecting the Sheriff to an action, if he has not the body at the day. The Plaintiff may consider the Sheriff as bail, and the Defendant in his custody, and proceed to judgment; whereas in England, the Plaintiff cannot proceed in such case to judgment. If the Sheriff is to be considered as bail when he returns an arrest without a bail bond, and has not the party in prison, then he may surrender the Defendant at any time before final judgment against himself as bail upon a *sci. fa.*—which he cannot do if an action for escape lies against him. In England, a voluntary permission to go at large, will make a recaption by the Sheriff unlawful—here, it will not. The Sheriff is considered as bail, and perhaps may retake him for the purpose of making a surrender. Upon these considerations, it is possible that the action for an escape, where it is permitted by the Sheriff, is not the proper action; but that he ought to be proceeded against as bail by *sci. fa.* Perhaps this escape may have been effected by force and violence, under such circumstances as to make it a *rescous*, and then the Sheriff is not liable by any law. It is true, he has returned simply, that the prisoner escaped; but as he must have known, that a negligent or voluntary escape would not excuse him, he probably intended to have returned a *rescous*.—An opinion was given by some of the present Judges, not long ago at Halifax, that a Sheriff upon a negligent escape, might be considered as bail. I wish to consider of the case before I give my judgment—I wish it to be specially stated.

It was so stated accordingly, and afterwards in this term was argued by *Duffy* for the Sheriff, and *Taylor* for the Plaintiff; and the court gave judgment for the Plaintiff, saying, the returning an escape excludes the supposition of the Sheriff's having become bail—though *Mr. Duffy* strongly insisted, that the Plaintiff by proceeding to judgment as he had done in the County Court, had thereby admitted, notwithstanding the return, that the

Defendant was in court, which could not otherwise be, ^{Apr. 1797.} than by his returning to prison after the return, or by being considered as bailed by the Sheriff. To which it was answered *e contra*, that the judgment is erroneous for that (487) cause, but is to be considered as a good judgment till reversed.

NOTE.—*Vide Swepson v. Whitaker*, and the note thereto, *ante* 224.

Anonymous.

The decree of the court made at a former term, was, that each party should pay his own costs. Upon which a doubt arose, whether each party should pay half the costs, or only the costs which had accrued upon business done for himself. And at the last term it was brought before the court, who decided that each party should pay for the process issued for his benefit. And then another question arose, whether a copy of the bill taken out to be served on the Defendant, was for the benefit of the Plaintiff or the Defendant. And at last term, after much argument, WILLIAMS and HAYWOOD, Judges, differed in opinion. The matter was again moved now and argued, and the court clearly agreed, that it was a part of the process to bring the Defendant into court, without which he could not be effectually brought in; and therefore, it was for the Plaintiff's benefit, as much as the *subpoena* was, and therefore, that he should pay the expence of it under the decree.

Anonymous.

A writ issued against two jointly, and one plead in abatement.—
Plaintiff was suffered to take judgment against the other.

A writ issued against two upon their joint and several bond, and was returned, executed upon both. One pleaded in abatement, that the process was not served upon him in due time, and the writ was abated as to him; and then *Spiller* moved to have judgment against the other.

HAYWOOD, Justice.—This action as you have brought it, is a joint one, and an abatement as to one, is therefore an abatement of the whole writ; for otherwise your judgment will not be as broad as the writ—that demands a debt against two, the judgment will be against one only; the other by his contract, is to be contributory to the debt,

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and the court will not discharge him because of an irregular service of process, and lay the burden of the whole upon the other—that does not go to the merits, nor does it prove him not to be contributory, as you have declared he is.

STONE, Justice.—I think the Plaintiff is entitled to judgment. If two are sued, and both plead the general issue, and there is a verdict for one, the Plaintiff may have judgment against the other. *Spiller* then cited *Gil. L. Ev.* 159. 5 *Re.* 119, and the court permitted him to enter his judgment.

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Quere de hoc.—For if two be sued upon a joint bond, and both plead *non est factum*, and it be found for the one, and against the other, then it appears one of them can never be made contributory. Though the Plaintiff should be put to a new action, he is forever discharged by the verdict, and therefore, the law will give judgment against the other, as there must be a writ of the same form against him, should a new one be taken out. But where one only abates the writ as to himself, that does not prove him not to be a co-obligor; it is still to be taken according to the Plaintiff's averment in his declaration, that he is a co-obligor, and jointly contributory with the other, and therefore jointly to be proceeded against with him; this other ought not to be made answerable for the whole debt, when the Defendant who pleaded in abatement, by his contract is equally liable, merely because the Plaintiff has chosen for instance to misname him, or has committed some other irregularity, which causes the writ to be abateable as to one. The Plaintiff is bound by law and his contract to sue both. If he sues one only, the writ may be abated for that. *Stra.* 503, and yet according to this determination, the Plaintiff may do that indirectly, which the law will not suffer him to do directly; for he may misname one, and have an abatement as to him, and then proceed against the other alone. It is no answer to say, that joint bonds are now considered in law as joint and several; for if the Plaintiff sues upon it as a joint bond, then it is in all respects, still to be held as a joint bond, and all the common law rules respecting joint bonds, attach upon it. If there be two Defendants, and they plead several pleas, and the Plaintiff take issue upon one, and demur to the other, and the issue be found for the Defendant, the court will not proceed on the demurrer. 1 *Bac. Ab.* 15. *Hob.* 250, *et sic vice versa*—for in both cases the suit being once abated, it would be impertinent to judge whether it ought to abate on the other's plea. *Vide* also *Hob.* 180, where Plaintiff sues two, and is nonsuit as to one before judgment against the other, he is barred as to both. If there are two executors, and the one is misnamed and abate the writ, it is abated as to both. 1 *Bac. Ab.* 11. 6 *Mo.* 10. Though one Defendant may be acquitted in part and condemned in part of a trespass; or one condemned in the action, and the other acquitted, the writ cannot abate as to one and subsist as to the other, though 8 *Co.* 159, seems *e contra*.

NOTE.—This decision was certainly an erroneous one.

Anonymous.

The declaration stated an undertaking by two with a third, to run a race with him, and to pay him if he won

The evidence was, of a race made between one of the two ^{Apr. 1797.} and the third ; for performance whereof, the other of the two became his surety on the day of the race.

Per curiam—This is a fatal variance—you should have stated the contract as it really was. *Mr. Taylor* for the Plaintiff insisted, he could maintain it, and prayed time for that purpose. So a special case was made ; and afterwards, in this term, the court calling the cause, *Mr. Taylor* declined arguing it, and the Plaintiff was nonsuited.

NOTE.—*Vide Buller's Nisi Prius*, 145.

HALIFAX, APRIL TERM, 1797.

Jones v. Jones.

Rocks in a river above the surface of the water, are vacant property, and the subjects of our entry laws.

Trespass, *quare clausum fregit*. Issues, *liberum tenementum*, and justification. On the trial, the Defendant admitted he had repaired a stand, erected in the river Roanoke to catch fish, and that he had fished there. It was stated by the Plaintiff's counsel, that this action was brought for the purpose of trying the right of fishing amongst the islands at the falls. The Plaintiff deduced his title as follows : First by a grant from the Governor to *Griffith*, for thirty-seven small islands—*Griffith* conveyed to *P. Johnston*, and she to the Plaintiff. Also he produced a State grant for these Islands, rocks and stands, issued under the act of 1787. He also produced a grant for an adjacent tract, the boundaries of which included one bank of the river. His counsel stated, that the stand in question was in the middle of the river, that the Plaintiff had a title to these islands, rocks and stands, prior to 1787 ; also a title under the act of 1787, and a title to one of the banks by another grant. The Defendant's counsel rested his defence on the long possession the Defendant had of this stand prior to the State grant ; and that as the river above the falls was not navigable, the bed thereof, and the right of fishing, belonged to the proprietors of the adjoining lands on each side. He then gave

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Apr. 1797. evidence of the antiquity of this stand, and that the rock where it is, has been rendered an excellent place for fishing, and stands two hundred yards from the islands, and on the south side of the river.

The counsel for the Plaintiff grounded his argument on the following points: Observing that this rock or stand, as it was not opposite to any island claimed by the Plaintiff, may render the judgment to be given in this case, less decisive of the general question respecting the islands and stands adjacent to them, than was at first intended, he proposed first to consider, how the common law stood, and what right the Plaintiff had, prior to the grant of 1787, as to which he sued. The soil or bed of a navigable river belongs to the public. *Doug.* 429. 1 *Mo.* 105. And the correct idea of a navigable river is, one which ebbs and flows, so far as it ebbs and flows. *Doug.* 427, 441. *Cowp.* 86. Yet notwithstanding the general right is in the public in navigable rivers, a private man may acquire a right to a free fishery. 4 *Com.* 448. 3 *Term* 253. 4 *Burr.* 2162—and hence it follows, that even in navigable rivers or arms of the sea, one of our citizens may acquire an exclusive right of fishing by a grant from the State. Whoever is the owner of the soil or bed of the river, has the exclusive right of fishing; and that ownership of the soil or bed of the river, may be granted by the State, and has been conveyed to us under the grant of 1787. This secures the exclusive right of fishing to the grantee. 2 *B. Com.* 40. 1 *Inst.* 122. In this country (490) there is no such thing as title by prescription, and therefore, it cannot be pretended that a title may be acquired by it to the overturning of our grant. 1 *Inst.* 122 note 7. A right, as it is sometimes acquired in England, by long usage, against the owner of the soil, cannot apply here. *F. N. B.* 200. And then there remains no other means of acquiring an exclusive right of fishing, but by a title derived under the owner of the soil, 5 *Burr.* 2814—and this the Defendant does not pretend to.

Counsel for the Defendant—This river is either navigable, or it is not. If it is a navigable river, the right of fishing in it is common to all the citizens—the bed or soil of it cannot be granted at this day, nor can any citizen be disturbed or restrained of his right by any State grant. The Crown in England was long ago restrained from making such grants. 6 *Mo.* 73. 4 *Bac. Ab.* 156. 1 *Mod.* 106.

If it is not a navigable river, then the bed of the river belongs to the owners on each side; each claiming to the middle of the water. 4 Burr. 2 62 4 Bac. Ab. 153.—Doug. 427. 4 Bac. Ab. 156. Vattel 104, sec. 246—and then it is not subject to be granted by the State, being already appropriated. All that the Legislature can do with respect to the rights of fishing in navigable rivers, is, to pass laws, prescribing the mode in which that right is to be exercised by the citizens. Vattel 104, sec. 246. In England, a franchise of free fishery, must have been granted before the charter of *King John*—for all such grants in future are prohibited by that charter.

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Admit the islands may be granted, yet a grant of them will not pass the rock, which stands in the river at a great distance from either of them—but in truth the islands are not grantable—they belong to the owners of the nearest adjacent lands; even the grant of 1753, comprising the islands, did not extend to this rock, nor was legally comprehended in the State grant, issued under the act of 1787. That act says, that all and every person and persons owning lands on said river, at and against and contiguous to any rocks or islands not yet entered and taken up, shall have the privilege and liberty of taking up the same agreeably to the laws for taking up land now in force, provided they enter and take up such islands, rocks and stands within six months, &c. The rock in question, was nearer to the lands of another person than the grantee—his lands are not at, adjoining and contiguous to this rock, in comparison with the lands of that other. The grantee was not a person intended by the act to have the right of pre-emption. The grant has issued upon wrong suggestions, and is therefore void. Bull. 76. 1 Co. 44, 45.—The Governor was not authorised to execute such a grant. Thus the grant is not only void, because the rock belonged to the owner of the land nearest to it, but also for this other reason, that it issued without authority given by the State to issue it.

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Counsel for the Plaintiff—They rely upon their possession, but possession cannot ripen into title unless it be a continued and constant possession—the possession of the Defendant has been for five or six weeks only in a year, therefore it cannot avail him. It is admitted on the other side, that no right can be acquired in this country by prescription—I shall therefore say nothing more

Sep. 1797. on these points. It is argued, that this is a navigable river, and therefore could not be granted, and 1 *Bl. Com.* 286. 2 *Bl. Com.* 39, is relied on. It is true, in England such grants were restrained by particular laws, intending to restrain the prerogative; but these laws are not in force here—our Legislative body is only restrained and regulated by the Constitution. Acts passed by them for the public good, and not repugnant to that Constitution, must be enforced. It is not a true position, that in case of private rivers, or rivers not navigable, the islands belong to the owners of the adjacent land. Such islands, either on navigable or unnavigable rivers, contain land and territory, and must be entered before they become private property. This appears by our entry laws. 1777, c. 1, s. 10, and if islands are to be entered and do not follow the adjoining lands, then upon the principle of the Defendant's counsel, the owners of the islands are entitled to a part of the bed of the river on each side of the islands. The act of 1787, is founded in good policy, and does not exceed the powers of the Legislature. It was made to prevent strangers, not citizens of North-Carolina, from stopping up the river with their stands, and depriving the land holders of the benefit of fishing; such persons trespassed upon the adjoining lands, committed injuries and transgressed the laws of the country, and immediately withdrew themselves into Virginia before they were taken by process issued for the purpose; or if they were by accident apprehended, they were generally unable to make compensation. Under the directions of the court, the jury gave a verdict for the Plaintiff.

NOTE.—This case *ex relatione*, and I have been informed that the judgment of the court, (WILLIAMS and MACAY, Judges,) proceeded upon the ground, that the rocks in the river above the surface of the water, were vacant property, and the subjects of our entry-laws.

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NEWBERN, SEPTEMBER TERM, 1797.

Simon Bright v. Robert White.

A purchaser of lands under a Sheriff's sale, cannot sustain an action for money had and received against the Sheriff, upon the ground that the title was bad, and the consideration had therefore failed.

Action on the case, for money had and received to the Plaintiff's use; and the general issue pleaded; and upon

the trial the evidence was: that *Oram* obtained a judgment against *Bright*, the father of the Plaintiff, whereupon execution issued, and the Defendant, as Sheriff, sold a tract of land to the Plaintiff to satisfy it—that the Plaintiff afterwards instituted an ejectment to recover possession, and there was a verdict and judgment against him; the Defendant paid over part of the purchase money to *Oram*, and took his receipt; the residue he paid to *Bright*, the Defendant in the action. Sep. 1797.

Badger, for the Plaintiff, argued, that although no case precisely in point with the present was to be found in the books, where a Plaintiff under such circumstances, has been held to be entitled to recover; yet certain principles had been established by a number of decisions, which go the length of warranting the judgment we are now seeking. It is laid down in 1 *Burr.* 112, that wherever a person has paid money upon a consideration which happens to fail, or where *ex æquo et bono*, he ought to have his money returned, his action will lie to recover it back. It is founded in reason and justice. Here the consideration has failed, the Plaintiff has not been able to obtain possession of the land for which he paid his money; the land belonged to a third person, and not to the Defendant in the action where *Oram* was Plaintiff. The Sheriff has received the money, and ought to return it. It cannot be denied, that if the Sheriff levies an execution upon the property of a third person, he is liable to that person's action—the writ does not authorise a seizure of any property but that of the Defendant's—There is equal reason why he should be liable to the action of the vendee, for the writ does not authorise him to sell to the vendee any other property than that of the Defendant. He is guilty of a wrong and deceit to the vendee, if he sells to him the property of any other than the Defendant. Should a private man sell property as his own, which turns out not to be so, he is liable to the action of the vender; and why should not the same law extend to the case of a Sheriff? With respect to the sale of lands, there are as strong reasons for making the Sheriff responsible, as there are for making a private vendor so. In the latter instance, the buyer may call upon the vendor for an inspection of his title deeds, and the seller has them to shew; if the buyer will take reasonable care, he cannot be deceived; but where a Sheriff sells, he has

Sep. 1797. not the title deeds; the vendor has no means of getting
 (493) them for his inspection—therefore the Sheriff should be careful not to sell lands the property of a third person. He cited 1 *Term* 732, to prove that the sale of an annuity by an invalid and void deed, subjects the vendor to an action for the consideration money; and also a case from *Dallas*, to shew that the vendor of lands not his own at the time of sale, is liable to refund the purchase money. The rule is, that he who is guilty of a wrong, shall take the consequences of it—and it must be admitted, that in seizing and selling the lands in question, the Sheriff was guilty of a wrong; the consequences whereof have been prejudicial to the Plaintiff, who has been drawn in, to part with his money for nothing, and this through the misconduct of the Sheriff. Had he not wrongfully seized and sold the land, the Plaintiff would not have been deceived, nor would have parted with his money as he did.

Davie for Defendant—The principle that he who has paid money upon a consideration which fails, shall recover it back of the receiver, is a good one; but it is not to be understood in the latitude the Plaintiff's counsel assigns to it. He who has received money in his own right and to his own use, upon a consideration which fails, ought to refund it; and an action to compel him to refund, is sustainable: but if he acts as agent or trustee for another, or as a public officer, and receives the money for a third person, and pays it over, he is not liable to refund. A contrary doctrine would destroy all agencies, attorneyships, and offices subject to the operation of it. These persons are not benefited by the receipt of the money—they receive it for others—they are mere instruments, whereby the money is delivered from the hands of one party into the hands of the other; it is deposited with them for the use of another. The cases cited by the Plaintiff's counsel, and all other cases upon the same subject, extend only to support the action against a receiver of money to his own use—that was the case cited from *Burrow*—there the Defendant received the money to his own use; that was the case of the annuity—the Defendant had received the money to his own use. The same remark applies to the case from *Dallas*. These authorities therefore are not applicable to the present case, which is that of a Sheriff, who has received money for the Plaintiff in the action. This action cannot be supported by a

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ny adjudication to be found in the books ; although occasions of resorting to such an action, were it maintainable, have occurred almost every day for hundreds of years. This of itself is a strong argument against the present attempt. There are many cases which decide, that an agent is not liable for monies received to the use of his principal, and paid over before an action commenced against him—*Buller v. Harrison, Cowp.* 566, is one. I admit the Sheriff is liable to an action, if he levies his execution upon the property of any other than the Defendant : that is to say, in the case of personal property. But it is equally true, that he is not liable for levying on the lands of another than the Defendant ; because the lands are not to be removed out of the possession of the occupier, and delivered to the vendee, as personal property is. When lands are sold, the Sheriff does not deliver possession to the vendee—he must obtain that by action or other lawful means. The Sheriff need not even make a seizure of lands in order to a sale : that was decided some years ago at Halifax, in the case of *Baker and Long* ; and that he need not deliver possession, was decided in the case of —*v. Nichols*, at Hillsborough. Therefore were the inference correct, that because the Sheriff is liable to a third person, for seizing his goods upon execution against the Defendant, he is also liable to the vendee, which it is not ; yet as that proposition fails in the case of lands, the conclusion must also fail with it—and so the Plaintiff is not entitled to recover.

Badger in reply—The rule about refunding when the consideration fails, is laid down generally, and is not in any book where it is to be met with, restrained to the case of money received to one's own use ; and as we profess to be governed by former precedents, that rule cannot be now altered to suit this case. There is no hardship in subjecting the Sheriff to this action—to do so will make Sheriffs more cautious. When they know that the invasion of another's property is at their own risk, they will become careful not to intermeddle with property which does not belong to the Defendant ; and then neither strangers to the action, nor vendees, will be involved in difficulties. In the present case, the Sheriff has manifestly done wrong, and the consequences are injurious to the Plaintiff, and justice requires a recompence.

Per curiam—WILLIAMS and HAYWOOD, Justices.—If a man receive money to his own use and to his own benefit,

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upon a consideration which happens to fail, he is liable to refund ; but if he receives it as agent for another, or acting for another, and pay it over, he is not liable to refund. It may not be so expressly laid down in any one case in the books, where the receiver to his own use is sued ; but that this is the law, may easily be ascertained by a comparison of the cases, where a receiver to his own use is sued, with those where the Defendant has been sued as agent, or the like ; the case in *Cowper* decides, that he is not liable when sued as an agent. Another well known case is, where letters of administration are obtained, and the administrator appoints his attorney, who receives money and pays to the administrator, and then the letters are repealed and granted to the next of kin, and he sues the attorney—the attorney is not liable to his action—this goes upon the same principle. Another case coming very near the present is, where the executor sells a term for years, which he supposes to be the testator's, and the vendee is ejected by judgment and sues the executor—he is not liable ; because he may have paid over the monies to creditors or legatees. *Doug.* 654, 656. The reason of these cases governs that of a Sheriff selling land by virtue of an execution—he receives the money not to his own use, but to the use of the Plaintiff in the action ; when he has paid it over he is not liable ; for if he be, how is he to be recompensed ? He cannot recover back of the Plaintiff—the Sheriff is not bound to warrant the property, for he is not benefited by the money as a private vendor is. No Sheriff, executor, or the like, would ever be safe, were they bound to warrant the property sold. They frequently have not the means of knowing whether the title be good or bad. Their estates would be perpetually in danger. The property sold, might at any distance of time after the sale, be recovered of the vendee or his heirs, and the Sheriff become liable thereby. No man, under such disadvantages, would become agent, executor or Sheriff. The doctrine contended for by the Plaintiff, in the present action, would destroy all such agencies and offices, beneficial as they are, to the public. It does not follow, because the Sheriff is liable to a stranger for selling his personal effects, that he is also liable to the vendee ; but if it did, the argument fails when applied to lands—the Sheriff is not bound to seize them—lands do not pass as personal estate does, by sale

and delivery. Moveables are seized in order to their delivery. There is no occasion to seize lands for the same purpose—when sold, they need not be delivered to the vendee—the Sheriff cannot expel the possessor and put the vendee into possession—and therefore, the Sheriff is not liable for selling the lands of a stranger to the execution. The dispute lies in such cases, between the vendee and the claimants. The vendee purchases at his own risk. The Sheriff is not subject to the claimant's action, the conclusion drawn from his liability in cases of personal property fails. We are clearly of opinion, the present action cannot be sustained. Verdict and judgment for the Defendant.

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Witherspoon and Wife v. Blanks.

Per curiam—WILLIAMS and HAYWOOD, Justices.—If a line be to terminate at a natural boundary, as a mountain, pond, rock, &c. and the distance is completed before arriving at it, still the line must be continued on till that natural boundary be intersected. Also if a natural boundary be mentioned in the patent or deed as terminating a line, and the course called for, goes beside that point, the course shall be corrected, and such a course taken, as leads directly to it from the last termination. In such case, there is as much reason for disregarding the course described in the deed, as there is for disregarding the measurement or length of the line as described therein: but in this case, either line terminated at a natural boundary, which might be that mentioned in the patent; and there being evidence in favor of both, the jury found for the Defendant. The court however, granted a new trial.

NOTE.—Vide note to *Bradford v. Hill*, ante 22.

Foreman v. Tyson.

State grants cannot be avoided by evidence in ejectment, recourse must be had to Equity for that purpose. Where two patents bear the same date, HAYWOOD, Judge, thought the priority of number might decide the preference in the absence of other proof; but WILLIAMS, Judge, *contra*.

Ejectment. And not guilty pleaded. On the trial, Foreman produced in evidence a State grant, dated the 21st of October, 1782, to one James Lanoir; and then

Sep. 1797 deduced the title regularly to himself. The Defendant also produced a grant for the same land, dated on the same day—thereupon the Plaintiff stated, and offered to prove, that *Tyson's* grant was obtained against the provisions of the act of 1777, c. 1, sec. 9, which declares all titles obtained otherwise than according to the directions of that act, to be void.

(497) *Davie*, for the Defendant—The decisions of our courts ever since the act of 1777, have been, that grants under such circumstances shall be avoided in a Court of Equity, not indeed by repealing the grant, but by decreeing the grantee to convey to him who should have had the title; these decisions will govern the present case, and operate to the rejection of the testimony offered.

Baker, for the Plaintiff—Wherever an act of Assembly declares, that a deed obtained under particular circumstances, shall be void—a deed obtained under such circumstances, is absolutely void to all purposes; and there need not be any direct judgment to make it void. It may be objected to, and its invalidity shewn whenever it becomes material to shew it in any action whatsoever. And he cited 2 *Term* 604, 515, 561, 568.

Davie, e contra—Grants of the State, or of the King in England, are of record, and cannot be avoided but by something of as high a nature—therefore it is, that in England, a judgment must be pronounced against them upon a *sci. fa.* brought to repeal them, before they can be deemed invalid. They are like judgments, valid in law, till repealed by competent authority. But if the cause of the invalidity of a grant appears of record already, there is no occasion for a *sci. fa.* and the court may proceed to vacate by judgment without any verdict upon the *sci. fa.*; and for this he cited 4 *Com.* 397. In the present case, no cause of invalidity appears of record, and the grant is valid and cannot be avoided in this action by parol testimony.

HAYWOOD, Justice—Were this *res integra*, I should be of opinion that such evidence as is now offered, ought to be received; and this opinion would be founded as well upon the act of Assembly, as upon the common law.—The act says, a grant issued under certain circumstances, shall be void; it is now said, and I believe properly, that Equity will not repeal the grant. The *sci. fa.* issues in England from the Court of Chancery on the law

side, and is returned into that court for judgment, after a trial upon the issue of fact in the King's Bench—or in case of a demurrer, judgment is given by the Chancellor without sending the record out of his court at all. It would seem to follow from hence, that a *sci. fa.* to repeal a grant could not issue from this court, and if it cannot, there remains no other mode of avoiding the grant, but by shewing its invalidity in an action. It is evident, the act of Assembly intended that the grant should be avoided in a Court of Law; for at the time of passing the act of 1777, and for five years afterwards, no Court of Equity existed in this State. With respect to the common law, I have no doubt, but that such evidence might be received; the authorities cited at the bar prove it; and there is a case of ejectment, 10 Co. Re. 109, in which the effect of a grant was avoided by evidence given to the jury to shew its invalidity. There are other cases in trespass, and other actions reported by the same author, where grants coming incidentally to be examined before the court, were avoided upon testimony given to the jury. There are two ways at common law of impeaching a grant; either upon a trial at law, where the validity of the grant comes in question, or where the party likely to be prejudiced by it, and apprehending a loss of evidence to prove its invalidity, brings a *sci. fa.* and obtains judgment of cancellation and repeal, and so destroys the grant itself; but there is no use of the latter proceeding, where the evidence to counteract the grant, is as permanent in its nature as the grant itself; that is to say, where the evidence is of record. But though this would have been my opinion, had no decisions taken place in our court, I cannot now but consider myself bound by those adjudications which have been made; it is better to adhere to them, than to render the law uncertain by contrary decisions. I must, therefore, yield to the authority of the decisions, though I cannot concur with the reasons which have been given for them.

Judge WILLIAMS—I am satisfied with the former decisions: I have heard many arguments upon this question, and I am every time, more and more strengthened in the opinion, that the former adjudications are proper. To avoid a grant upon parol testimony, would be dreadful indeed: the most valuable estates might be overturned by one or two corrupt witnesses at any time. It is far

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Sep. 1797  better to reject such testimony, than let in such an evil with it. So the evidence was rejected.

General Davie for the Defendant (the evidence being closed) insisted, that the Defendant being in possession, cannot be deprived of it legally, but by the Plaintiff's shewing a better title; which in the present case he has not shewn—his grant is of the same date with ours. As to the number of his grant—that indeed, is of an earlier number than ours, but the number of the grant is a circumstance of no materiality. The Secretary was examined in this cause last term, and he said the number was of no consequence in determining the priority—that the course of the office was, to make out the deeds for execution in the Secretary's office, and send them in a bag or box to be executed, when they are signed by the Governor as they happen to come to hand; after which, they (499) are returned to the Secretary's office all together in a bag or box, and recorded, and numbered as they are recorded. The course of the office is to be regarded, in like manner, as the course of business in mercantile transactions—and if it be to be regarded, then it is evident the circumstance of numbering the deeds, is immaterial in a question of priority. It is not required by any law; it was introduced into practice to facilitate business in the Secretary's office. Men's titles are not to be decided by recurrence to circumstances so trivial—they cannot be regarded—and then there is nothing to determine the priority, the court having rejected that of the priority of the survey.

Baker for the Plaintiff—The date of the grant is what has hitherto been adopted, as the rule of deciding upon the point of preference; that fails in the present case, and we must necessarily recur to some other circumstance or leave the point undecided—and the parties, to endless contention. The number proves that the deed first numbered, was that which was first recorded; and recording is the circumstance which finally completes the grant.—The priority of the number in our grant, is therefore a proof that it was complete before the other—and of course the title first vested and was complete in us. This point was decided by Judge HAYWOOD, at Wilmington, some time ago, as I am informed.

General Davie—The case at Wilmington did not depend upon this point—it was decided upon the statute of

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limitations—I was concerned in it. As to what is argued, that the recording the grant is the completing circumstance, that is indeed necessary, but is of no weight in deciding priority of execution. The grant or deed when recorded, relates to the date—the common case of deeds of bargain and sale proves this. If two deeds for the same land be granted to two different persons, and the deed of the latter date be first registered, that will not defeat the title of the first bargainee—but his deed afterwards recorded, shall relate to the date thereof, and give him the preference. The time of recording therefore, is immaterial.

Per curiam—The jury had better give a special verdict that the law upon this point may be settled upon a deliberate decision. *Et per Judge HAYWOOD*—I am inclined to think the priority of number, is of some weight in the decision of this case. It will not do to say in case of two grants of equal date, that he shall prevail who is in possession. It should be decided by some rule more satisfactory. In common cases, the date of the grant is resorted to, although it is plain, that gives no certain proof of priority of execution; for the grants are made out ready for execution, and dated a long time before the actual execution takes place. In fact, as the grants are sent in large numbers to the Governor's Secretary to be executed, and are executed as they happen to come to hand, it may, and no doubt frequently does happen in fact, that a deed of latter date is first executed. Or suppose, they are dated by the Governor's Secretary as they come to hand, after the execution, still it may happen, that a deed first executed, may be the last dated. But as some circumstance must be taken, the courts have adopted that of the date—and where that is found not to answer the purpose, some other circumstance, by parity of reason, should be resorted to, and priority of number is some evidence, though not conclusive, that the deed which has that circumstance in its favor, was first dated.

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The jury found for the Plaintiff, and a new trial being moved for, Judge WILLIAMS was for granting it; but Judge HAYWOOD would not now deliver an opinion upon the motion, saying, a State grant might be suspended at any time, before it was enrolled—which proved, that before enrolment, the grant was not complete; and this differed from the case of the enrolment of a deed of bar-

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gain and sale, which could not be prevented after the execution—that the point deserved consideration, and he would endeavor to form an opinion, when it should be argued hereafter upon this motion.

NOTE.—As to the first point ruled in this case, see *Reynolds v Flinn*, and the note thereto, *ante* 106. Upon the last point, see *Andrews v. Mulford*, *ante* 311, and *Riddick & Wife v. Legget*, 3 *Murph.* 539.

Anonymous.

When a Defendant in ejectment dies, the suit will abate, and cannot be revived by *sci. fa.* against the heirs.

Ejectment. The Defendant died pending the action, and a *sci. fa.* issued against his heirs, who came in and pleaded the death of the Defendant in abatement. *Et per curiam*—WILLIAMS and HAYWOOD, Justices.—The acts for continuing suits on the death of either party, extends only to such cases, where before the act, the executors by a new suit might sue, or be sued after the abatement of the former action, not to those cases where after the abatement by death, no new suit could be maintained by or against them. The intent of the act was to save the expences of an abatement, and the delay consequent upon it; and as ejectment before the act, abated by the death of the Defendant, and could not be supported against executors or heirs, for the ouster in the lifetime of the deceased, it will abate since the act in the same manner as before. The act never meant to subject executors or heirs to actions, which they were not liable to before the act. So the action abated.

NOTE.—This is altered by the act of 1799, *Rev. c.* 532.

Carruthers v. Tillman.

(501) This was an action on the case for a nuisance, and overflowing the lands of the Plaintiff, by erecting a mill-dam; and evidence was given of overflowing about thirty or forty acres of low land, which before the erection was usually overflowed at high water.

Per curiam—WILLIAMS and HAYWOOD, Justices—This action lies for any overflowing of the Plaintiff's land, the maxim being, you must so use your own, as not to prejudice another's property; but the action may be continued from time to time, till the Defendant is compelled to abate the nuisance; every continuance thereof after a pre-

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ceding action, being considered as a new erection—the first action is regarded as a trial of the question, whether a nuisance or not—therefore it is not proper, in the first instance, to give exemplary damages, but such only as will compensate for actual loss, as killing the timber or overflowing a field, so as to prevent a crop being made upon it, and the like. But where the abating the nuisance will restore the lands to the same value and use as before the nuisance, and no real loss has been as yet sustained, the damages should be small; but if after this the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance. There was a verdict for the Plaintiff, and six-pence damages.

NOTE.—*Vide* ——— *v. Deberry*, and the note thereto, *ante* 248.

Den, on the demise of Faircloth *v.* Ingraham and Jones.

Ejectment, and not guilty pleaded—and the jury being sworn, the Defendant's counsel disclosed, that the demise laid in the declaration was expired, and moved for a nonsuit; insisting that though the demise might be amended, if prayed before the jury are sworn, it could not be done afterwards.

Per curiam—WILLIAMS and HAYWOOD, Justices.—The demise is a mere fiction—the jury are not sworn upon that, but to try the title only. It may be amended at any time, or the exception may be overlooked, as it was in 2 Burr. 1159, where the demise after the trial was found to be laid upon a time not yet come. The nonsuit was refused.

NOTE.—*Vide* *Young v. Erwin*, *ante* 323. *Adams on Eject.* 203, 204.

Burrow *v.* Sellers' Executors.

The Defendant pleaded in abatement, that there were other executors not named in the writ.

Per curiam—WILLIAMS and HAYWOOD, Justices. The plea is bad—it should have stated that those other executors were qualified as executors, and took upon themselves the burthen of executing the will, as stated in the *Office of Executors*, 42, 43. The plea was overruled. (502)

NOTE.—*Vide* *Toller's Law of Executors*, 471. *Chitty's Plead.* 38.

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Blount v. Fish.

This was a *qui tam* action. The Defendant had died pending the action. *Et per curiam*—The act continues no suit which before the act was not maintainable against executors; and as this action before the act, would have abated by the death of the Defendant, and could not have been afterwards commenced against his executors, it is abated now. The action abated.

NOTE.—*Vide* same point decided in the case of *Smith v. Walker's Ex'rs.* 2 Car. Law Rep. 245.

McKenzie v. Ashe.

The Defendant had agreed to run his mare against a horse of the Plaintiff's and to pay one thousand dollars if he lost the race, or to pay four hundred dollars if he failed to run at the day and place appointed. His mare became by accident lame before, and continued to be so on the day of the race, and died in two days after. Two witnesses, the only ones examined to that point, said, that such accident by the rules of racing, could not excuse the Defendant from the forfeiture.

Per curiam—Whatever the rules of racing decide in such a case, should be the standard of decision now; the rule of law being, that if he is entitled to the penalty by the rules of racing, he is so by law. The jury were divided, and a juror withdrawn.

NOTE.—Upon enquiry after the trial, several persons well experienced in racing, gave it as their decided opinion, that no accident whatever could exempt the Defendant from the forfeiture in case of failure, unless he had expressly provided against it by his agreement.

NOTE.—*Vide McKenzie's Admrs. v. Ashe*, 2 Hay. 161. *Hunter v. Bynum*, *Ibid.* 354.



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ABATEMENT.

1. The objection that a joint obligor is not sued, must be made by plea in abatement at the proper time; it cannot be made at the trial of the cause. Such a plea cannot be made at all since the act of 1789, *ch. 57.* — *v. Kennon's adm'r's.* 216
 2. If a plaintiff procures a copy of his bill and a subpoena, and deliver them to the Sheriff in time to be served on the defendant ten days before the term and the sheriff neglects to make the service until ten days before the next term after that, the plaintiff's bill shall not be dismissed by a plea in abatement under the act of 1782 *ch. 11, sec. 2.* *Anonymous,* 286
 3. Under the acts of 1777 *ch. 2, sec. 10,* and 1793 *ch. 19, sec. 1,* it is held, that a plea in abatement is not the proper mode to take advantage of the Plaintiff's having brought his suit in the Superior Court for less value than fifty pounds. *Sur. Parts. of McNaughton & Co. v. Hunter,* 454
 4. A plea in abatement that the plaintiff is an alien, is not sustainable in the action of trespass *quare clausum fregit* — *Barges, by Guardian, v. Hogg,* 485
 5. Where a defendant in ejectment dies, the suit will abate, and cannot be revived by *scire facias* against the heirs. *Anonymous,* 500
 6. A *qui tam* action abates by the death of the defendant. *Blount v. Fish,* 502
 7. A plea in abatement stating barely, that there are other executors not named in the writ, is bad. *Burrow v. Sellar's ex'rs.* 501
- Vide *Jurisdiction, 1.*

ADMINISTRATORS AND EXECUTORS.

1. Letters of administration need not remain in court, and are not demandable, after issue joined. *Berry's Adm'r's. v. Pullam,* 16
2. An administrator may sue as such, upon his own possession: it is better

for him to sue in that manner, as the judgment will then be evidence against him of assets. *Id.* 16

3. Objected by counsel that a summons, and not a *capias*, is the proper process to bring in an administrator, and that an attachment founded upon such *capias* is irregular. *Moore v. Suttril's Adm'r.* 16
4. Former administrators removed and another appointed, but not made a party to this suit. The latter administrator will not be allowed to plead any thing to this suit, and the former administrators cannot plead the repeal of their letters after the first term since the repeal. *Bailey's Adm'r's. v. Cochran's Adm'r's.* 104
5. An account stated and signed by one administrator is binding upon all, and will bear interest from the time it was signed. *Id.* 104
6. Where an executor declares as executor, then he makes profert of his letters testamentary, and they are to be objected to in pleading, upon *oyer* of them, or by demurrer if any defect appears in the declaration; and after the first term, they need not be produced again. But when an executor declares upon his own possession, the fact of executorship forms part of his title, and must be proved upon the trial by the production of the letters testamentary themselves, unless they have been lost, when perhaps, other proof of executorship will be admitted. *Ex'rs. of — v. Oldham,* 165
7. When "no assets" are plead, the Plaintiff shall have judgment for the amount of the assets which he can show in the hands of the administrator, and judgment *quando* for the balance of his debt. *McRae v. Adm'r of Moore,* 182
8. When an executor omits to plead "no assets," it is an admission of assets which he can never afterwards controvert; and in such case the proper judgment is, that the principal

- sum recovered, be levied *de bonis testatoris* in the hands of the executor, and the costs *de bonis propriis*: and upon the return of the Sheriff that there are no goods of the deceased in the hands of the executor, then a *sci. fa.* issues to the executor to shew cause why the execution for the principal should not be levied *de bonis propriis*. *Parker v. Stephens*. 218
9. Administration granted when the next of kin are out of the country should be *durante absentia*, if otherwise, it is erroneous. *Ritchie v. McAuslin*, 220
10. The next of kin residing in another country may appoint a person to take the administration here. *Id* 220
11. The court should not grant letters to a person not designated in the act, before the persons designated have refused. *Id*. 220
12. The Superior Court will repeal the letters when improperly granted, and make an order for the County Court to grant them to the proper person. *Quere*, whether it should not have been a *mandamus*. *Id*. 220
13. Suit commenced against an executor returnable to the Superior Court, and suits afterwards commenced returnable to the County Court which sat first; to these latter suits the executor put in such pleas as made the assets responsible for their payment, and to the suit in the Superior Court he plead that he had no assets except what was liable to the payment of the other suits. The latter plea is not good; he ought to have confessed judgment to the suits in the County Court, and then plead those judgments to the suit in the Superior Court — *Anonymous*, 295
14. The plea of *plene administravit* must be true when it is put in, and not at the time of trial. *Anonymous*, 297
15. The administrator had failed to plead *plene administravit*, or any other plea shewing a want of assets, and the Plaintiff had obtained judgment and upon execution issued, "*nulla bona*" had been returned: held, that the administrator was bound to pay *de bonis propriis*, and for that purpose a special *fi. fa.* might issue reciting the return of *nulla bona*, and commanding the Sheriff to levy *de bonis intestati* if to be found in the hands of the administrator, if not, *de bonis propriis*. *Hogg's Ex'rs. v. White's Adm'rs*. 298
16. Letters of administration granted in another State, cannot entitle the administrator to maintain a suit in this State. *Anonymous*, 355
17. An administrator is bound to pay debts already due, before those not yet payable. *Evans v. Norris's Adm'rs*. 411
18. An administrator cannot retain against debts of superior dignity. — *Id*. 411
19. Voluntary payments after the teste of the writ are not allowable. They are certainly not if made after plea. — *Id*. 411
20. A payment made after the teste of the writ is not good in support of the plea of *plene administravit*. *Quere* by HARWOOD. *Sur. Part. of McNaughton & Co. v. Blocker's Adm'r*. 417
21. Judgments obtained against an administrator after the teste of the writ, and before the time of pleading, may be plead at the proper time. *Id*. 417
22. Debts assumed by the administrator before the teste of the writ, must be allowed him to the amount of his assumptions. *Id*. 417
23. When two judgments are obtained against an administrator, the first an absolute one, but the second a *quando* judgment, and assets afterwards comes to his hands, HARWOOD, Judge, said, that the assets must be applied to the first judgment; but STONE, Judge, seemed clear that they should go to the satisfaction of the second. *Anonymous*, 460
24. When an administrator does not distinguish in his inventory the good from the bad debts, all will be presumed to be good, until he can show that he brought suits for them and the debtors were unable to pay. *Anonymous*, 481
25. The plea of *plene administravit* should be received at all times, provided the Defendant does not come in with it at a very late period, to delay the trial. *Anonymous*, 484
- Vide *Trover* 1, 2, 5, 6. *Limitations, statute of* 1. *Abatement*, 1. *Joint Obligors*, 1, 2. *Husband & Wife*, 3, 4. *Detinue*, 6.

ADMINISTRATION, LETTERS OF.
Vide *Administrators & Executors*, 1, 9, 10, 11, 12, 16.

ACCOUNT.

1. The action of account will not lie for a legatee against an executor, or the executor of such executor. *Anonymous*, 226
 2. When to a bill filed, stating errors in an account settled four or five years ago, defendant pleaded specially, denying each error and also all fraud, if the Plaintiff does not take issue, and prove the error or fraud, the court will not disturb the account. *Blackledge v. Simpson*, 259
 3. An account taken by the Master, in the absence of one of the parties and without his having had notice of the time when it would be taken, shall be set aside. *Smith et al. v. Estis*, 348
 4. When a report is regularly taken but the items of the account are improperly allowed or disallowed by the Master, exceptions filed to the report are proper: but if the report is irregularly taken, then the objection goes to the whole report, and may be made and supported by affidavits on motion. *Id.* 348
- Vide *Administrators & Executors*, 5. *Limitations Statute of*, 5. *Payment plea of*.

ACTS OF THE ASSEMBLY.

Vide *Evidence*, 12, 14.

AFFIDAVIT.

1. An indictment upon an affidavit not signed, is good. *State v. Ransom*, 1
2. An affidavit of an agent, not a party in the suit, cannot be annexed to an answer to dissolve an injunction: but an order may be made to have the fact, which the affidavit was intended to show, tried by a jury at the next term. *Christmas et al. v. Campbell et al.* 123

AGENT.

Vide *Affidavit*, 2. *Evidence*, 16. *Partnership*, 2.

ALIEN.

Plaintiff sued on a bond, and the plea, which was founded on the 101st section of the act of 1777 ch. 2, stated in substance, that the Plaintiff had removed from the State to avoid assisting in the war of the Revolution; that he had attached himself to the enemy &c. *Held*, that if Plaintiff was a citizen of

this country, the 101st section before referred to, is repealed as to him, by several acts of the State Legislature; and if he was not a citizen but a British subject, then by the 4th article of the treaty of Peace, he is considered as an alien friend, and entitled to sue in our courts. *Cruden's ex'rs. v. Neale* 338

Vide *Abatement*, 4.

ALIMONY.

1. In a bill by a wife for alimony, it is most proper that the husband be held to bail at first; but if that has not been done, upon proper affidavits by the wife, the husband's property may be sequestered until he gives security for the performance of the decree. *Anonymous*, 347
2. In a bill for alimony, the court will not order a sequestration upon the ground that the defendant is wasting his property. *Spiller v. Spiller*, 482

AMENDMENT.

1. Plea in abatement that defendant is sued as executor instead of administrator: motion to amend under the act of 1790 was refused. Nothing can be amended under that act but what the other party might have specially set down as the cause of demurrer. *Cowper v. Edwards adm'r of Webb*, 19
2. A declaration in ejectment served on a tenant in possession, cannot be amended so as to comprise more lands than those already described. *Carter v. Branch*, 135
3. It is a practice among the bar to correct any mistake which the clerk may make in issuing writs. *Adams v. Spear* 215
4. Where the demise in an ejectment is about to expire before a trial can be had, the plaintiff will be permitted to amend by extending the term. *Den on dem. of Young v. Erwin*, 323
5. A writ cannot be altered from covenant to debt except by consent of parties: but it is usual among practitioners to permit the amendment, when the mistake was occasioned by the clerk. *Anonymous*, 401
6. An amendment cannot be permitted in an ejectment so as to embrace land not included in the declaration. *Troxler v. Gibson*, 465

7. An amendment will be permitted to extend the term of the demise in ejectment, even after the jury are sworn, or the exception will be overlooked. *Den on dem. of Faircloth v. Ingraham & Jones*, 501

APPEAL.

1. Motion in arrest overruled and appeal: the case stands, not upon the reasons in arrest, but an issue to the country. *Snowden v. Humphries*, 21
2. The neglect of bringing up an appeal under the act of 1777, c. 2, s. 84, in proper time, is not relievable by *certiorari*, although occasioned by the neglect of the clerk; and the appellee may move for the affirmance of the judgment with double costs, either at the first, or any other term, after the appeal. *Brickell v. Bass*, 137
3. An appellee may move for an affirmance of the judgment with double costs, either at the first or any other term, after the appeal, *per MACAY*, Judge. But *HAYWOOD*, Judge, denied the propriety of it, and a rule upon the appellant to shew cause at the next term, was ordered. *Anonymous*, 171
4. An appeal from the County to the Superior Court nullifies the judgment of the County Court. *Davison v. Mull*, 364
5. The appellant applied in time to the clerk for the papers, but could not procure them. The papers were, however, brought up after the fifteenth day before the term, and a motion was made to have them filed.— Upon the motion's being opposed by the appellee, it was refused upon the ground that the party had his remedy against the clerk. It seems if there had been no remedy against the clerk the papers might have been filed.— *Robertson v. Stone*, 402
6. The fifteen days before the term, in which appeals must be filed in the Superior Court, must be clear of the day of filing the papers, and of the first day of the term; at all events of the first day of the term. *Anonymous*, 402
7. When in appeal from the County Court, and a new trial had in the Superior Court, a verdict for as great a sum was obtained in the Superior

Court as had been rendered in the County Court, *HAYWOOD*, Judge, thought judgment might be entered up *instanter* against the appellant and his securities, under the act of 1785, c. 2, s. 2. But *STONE*, Judge, was of opinion that in such case the act did not apply. *Yarborough v. Giles*, 453

8. The fifteen days before the term, in which appeals must be filed in the Superior Court, are inclusive of the day on which the appeal is filed, and also of the first day of the term.— *Anonymous*, 462
Vide *Bail*, 1.

APPEARANCE.

- A motion to dismiss a cause brought up by a *certiorari*, was made upon the ground, that the notice which had been ordered at the last term to be given to the defendant, had not been given; but it appearing that the defendant had entered an appearance by the initials of his attorney's name being placed on the docket, the motion was refused. *Anonymous*, 405

ARBITRAMENT AND AWARD.

1. Award made and returned into court: exceptions to it were filed in writing; the answer to the exceptions was also filed in writing: both supported by affidavits. Judgment was given upon hearing them. This is the usual practice in such cases. *Cain v. Pullam* 173
2. An entry, "referred to A, B and C," means a general reference of the cause and not merely to audit and state the accounts. *Cleary v. Coor and Hawks*, 225
3. The award of arbitrators ought not to be set aside, unless in cases, where their decision is plainly and grossly against law; not where the point decided might be doubtful. *Id.* 225
4. In an appeal from the court below upon exceptions filed to the award of arbitrators, a new trial is not to be had in the Superior Court, but it will examine into the errors of law in the court below. *Burton v. Sheppard*, 399
5. A decree will be entered on an award, at the term at which it is returned, if no exceptions be made to the award at that time. *Southerland v. Mallett*, 461

ASSAULT.

Upon assault with intent to kill, the court may punish by fine only. *State v. Roberts*, 176

ARREST.

1. A warrant that does not state that the sum demanded is over five pounds but only that it is under twenty pounds will not authorize an arrest. *Lutterloh v. Powell*, 395
 2. If a Justice of the Peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it; but if it be for a matter not within his jurisdiction, the officer ought not to execute it.—*State v. Curtis*, 471
 3. If the officer be a known officer in that district in which he is acting, he need not shew his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to shew his warrant if demanded. *Id.* 471
 4. When he makes the arrest, he should briefly inform the party arrested of the cause, as—I arrest you at the suit of A. or in behalf of the State—otherwise, the arrest is not good. *Id.* 471
 5. If a warrant want a seal, it is void.—And a person, arrested under a warrant without seal, and without being told for what purpose he was arrested, is justified in resisting and beating the officer. *Id.* 471
- Vide *Escape*, 2.

ASSIGNMENT.

1. A witness may be introduced to explain the condition of an assignment. *Greenlee v. Young*, 3
2. Though a judgment is not negotiable, yet the law will so far take notice of an assignment as to protect it against the acts of the assignor. *Smith v. Powell*, 452

ASSIGNMENT OF ERRORS.

Vide *False Judgment*, 1.

ASSUMPSIT ACTION OF.

1. Assumpsit will not lie for a sum, for which there is a subsisting judgment. *Tune v. Williams*, 18
2. An action upon the case in assumpsit, will lie for the use and occupation

of a house, at least upon an express promise. *Anonymous*, 485

Vide *Extinguishment*.

ATTACHMENT.

1. An original attachment is only intended to compel an appearance, and where sureties are given they are exactly as bail and may surrender. *Hightower v. Murray*, 21
 2. An attachment bond is good without attestation. *Oneal v. Owens*, 365
 3. An attachment must issue, if the Plaintiff makes the proper affidavit, whether it be true or not. *Id.* 365
- Vide *Administrators & Executors*, 3.

AVERAGE.

When the vessel is lost, the goods that are saved are not liable to average.—*Ferguson v. Fitt*, 239

BAIL.

1. Suit in the County Court and judgment for Plaintiff: appeal by defendant to the Superior Court, with A & B securities to the appeal bond: before judgment in the Superior Court, the bail below surrendered the defendant and he was committed: after judgment in the Superior Court, the defendant being gone, *sci. fa.* issued to the sureties in the appeal bond, and it was held, that the surrender by the bail did not discharge them. *Cooke v. Little & another*, 168
 2. The plea of "surrender" by bail must state, whether the surrender was made to the court, or to the Sheriff out of court, else it will be bad in form. *Davison v. Mull*, 364
 3. Under our act of 1777 ch. 2, sec. 19, 20, 79, the bail may surrender at any time, before final judgment against them. *Id.* 364
 4. The plea, *puis darrein continuance* of the surrender, may be refused by the court in cases of hardship unless the Defendant will submit to the terms of paying costs. *Id.* 364
- Vide *Attachment*, 1. *Escape*, 1. *Sheriff*, 14.

BILLS OF EXCHANGE PROMISSORY NOTES, &c.

1. An assignee, two years after the assignment, sues the drawer and takes him in execution by a *ca. sa.* from

- which he is discharged by an insolvent act; recourse to the assignor is gone by the delay, (*Quere*, whether one year would not be too long) also by the *ca. sa.* and discharge therefrom.—*Greenlee Assignee, v. Young*, 3
2. An obligee, who has possession of a bill or bond, may scratch out any indorsement upon it, and bring suit in his own name. *Dook v. Caswell*, 18
 3. The negotiability of a bill or note may be restrained by indorsement, or by special words in the body of the note. *Smith v. St. Lawrence*, 174
 4. Indorser may sustain an action in his own name, either striking out the indorsement, or without it, possession of the note being *prima facie* evidence of payment to indorsee. *Id.* 174
 5. A bond, payable partly in money, and partly in specific articles, is not negotiable under the act of 1786, c. 4.—*Jamieson v. Farr*, 182
 6. An indorser may sustain an action in his own name, the possession of the note being *prima facie* evidence of payment to the indorsee. *Strang v. Spear*, 214
 7. Notice need not be given under the act of 1762, c. 9, s. 5, to the drawer, if he has no effects in the hands of the drawee. — *v. Stanton*. 271
 8. The receipt of part of the money from the drawee does not discharge the drawer, and as to the balance he is entitled to notice only where he would be so in case of the whole's being unpaid. *Id.* 271
 9. A negotiable instrument in the hands of an assignee is not subject to any payments that do not appear indorsed, if it was assigned before, or at the time, it became due; but if it was assigned after it became due, then all such payments, as it can be presumed the assignee had notice of, shall be good against it. *Black v. Bird*, 273
 10. If one, of two joint payees, endorses all his interest to the other, that other may maintain an action in his own name for the whole debt. *Sneed v. Mitchell's Ex'rs.* 289
 11. A note was given by the Plaintiff to *Watkins* for lands, which it turned out, *Watkins* never had; *Watkins* cannot recover on the note; and as the note, being for the delivery of specific articles, was unnegotiable, *Pickett* is subject to the same objection.—*Welsh v. Watkins & Pickett*, 369
 12. A note payable in tobacco is not negotiable, and being unnegotiable in its creation, it cannot be made so by any *ex post facto* circumstance. *Tindall's Ex'rs. v. Johnston*, 372
 13. Where a person receives evidences of debt from his debtor, for the purpose of collecting the money, and applying it to the credit of his debtor, he is bound to the same degree of diligence, in attempting to procure payment, and in giving notice of non-payment, though such evidences of debt be not negotiable, as if they were negotiable and had been indorsed.—*Per WILLIAMS, Judge.* But *per HAYWOOD, Judge*—The creditor would not be liable for any loss in such case, unless his debtor could show that the loss happened by his, the creditor's, neglect. *Brown, Campbell & Co. v. Adm'rs. of Craig & Cleary*, 378
 14. *WILLIAMS, Judge*, inclined to change the opinion expressed in the preceding case of *Brown, & Co. v. Adm'rs. of Craig & Cleary*, and to hold that unnegotiable paper, though indorsed, does not bind to the same diligence as negotiable instruments. *Alston v. Taylor*, 381
 15. Bonds made in Virginia and assignable by the laws of that State, but not assignable by our laws, must be subject to our laws when the contract of assignment is made in this State.—*Id.* 381
 16. A bond upon which is an indorsement purporting that it may be discharged by the payment of so much tobacco, is not negotiable under the act of 1786, c. 4. *Campbell v. Mumford*, 398
- Vide Partnership, 4. Injunction.*
- BOND.
- Vide Debt Action of. Attachment, 2.*
- BOUNDARY.
1. In the case of boundaries expressed in deeds and patents, the courses and distances mentioned in such deeds or patents, must be observed, except where a natural boundary is called for and shown, or where marked lines and corners can be proved to have been

made at the original survey. *Bradford v. Hill*, 22

2. The last line of a boundary was from a white oak, (which stood half a mile from the river) "thence along the river to the beginning": Held, that the river is the boundary. *Den on dem. of Sandifer v. Foster*, 237

3. General reputation is admissible as evidence in cases of boundary. *Stan-den v. Bains*, 238

4. Marked lines and corners may be established as the true ones, although variant from the courses and distances mentioned in the deed. *Id.* 238

5. When a natural boundary and courses and distances, are all given in a deed, the natural boundary will prevail in case of a variance; and in doubtful cases a regard to this preference must always be observed. *Den on dem. of Pollock v. Heirs of Harris*, 252

6. One line of a boundary was from a poplar on a swamp thence down the swamp to the beginning: Held, that the swamp and not a straight line from the poplar to the beginning, is the boundary. *Hartsfield v. Westbrook*, 258

7. If a course and distance be called for in a deed terminating at a natural boundary, *there* the line must terminate, whether it exceed or fall short of the distance mentioned in the deed. If a course and distance be called for, and there is no natural boundary nor marked line, the course and distance will prevail; but if there be a marked line and corner variant from the course and distance, the marked line and corner must be pursued.—*v. Beatty*, 376

8. When a natural boundary is mentioned in a patent or deed, it will control both course and distance if variant from it. *Witherspoon & wife v. Blanks* 496

9. Where there are two natural boundaries, either of which will answer the description, parol evidence may be received to shew the true one. *Id.* 496

BURGLARY.

1. If an out house be so near the dwelling house, that it is used with the dwelling house, as appurtenant to it, burglary may be committed in it. In this case, the out house was seventeen and a half feet from the dwelling house. *State v. Twitty*, 102

2. A burglary may be committed in a store house, standing twenty-four y'ds from the dwelling house, and separated therefrom by a fence, if the owner or his servants sometimes sleep therein. *State v. Wilson*, 242
Vide Indictment, 1.

CARRIER.

A person, who did not make it his ordinary employment, undertook to carry goods for hire; he is not to be taken as a common carrier, and liable to the same extent, but is bound only to common prudence.—*v. Jackson*, 14

CAVEAT.

Vide Grants, 9. *Possession*, 4.

CERTIORARI.

1. *Certiorari* lies, and indeed seems the only proper writ where a garnishee seeks to reverse an erroneous judgment against him. *Allen v. Williams*, 17

2. The word writ, in the act of 1787, extends to *certioraris* as well as to bills in Equity, and security must be given for prosecuting them, or they will be dismissed. *Walter v. Brodie*, 28

3. Motion to dismiss a cause by the Plaintiff in a *certiorari*, who had been Defendant in the court below, upon the ground, that the Plaintiff in the cause had not given security in this court for costs in pursuance of a notice served upon him for that purpose. *Per Curiam*, if the suit is now dismissed, we must order the court below to proceed to judgment. *Dawsey v. Davis*, 280

4. When a cause is removed by *certiorari* granted by a Judge out of court, it must be placed upon the argument docket, and Defendant's affidavits will be received to shew the impropriety of granting a new trial. If the *certiorari* be obtained in court upon a rule made upon the other party to shew cause, the case when removed, shall be put upon the trial docket without further argument. *Id.* 280

5. If a *certiorari* be obtained to remove a cause upon the ground that an appeal had been refused in the court below, the case shall be placed upon the trial docket, without shewing any other cause. *Anonymous*, 302

6. Any omission, neglect or delay of the clerk, or any contrivance of the adverse party, or the improper conduct of the County Court in granting an appeal when properly applied for, is sufficient to entitle the party to a *certiorari*, and a new trial will be immediately granted in the court above.—*Chambers v. Smith*, 366
7. Where a writ of *certiorari* is granted by a Judge out of court, the cause is placed upon the argument docket; where it is obtained in court upon an affidavit and a rule to shew cause, it is placed immediately upon the trial docket; but if obtained in court without a rule, &c. it must be placed upon the argument docket. *Anonymous*, 367
8. Where a *certiorari* issues, the adverse party has notice to appear on the return day of the *certiorari*, & if the writ is not then returned, nor any proceeding had to continue it in court, it is like other writs discontinued, and a *procedendo* ought to issue. *Anonymous*, 420
Vide *Appeal*, 2. *Appearance*.

CHOSE IN ACTION.

1. A slave wrongfully taken out of the possession of A and sold to B, and while in the possession of B, sold by A to C, may be recovered by C, in a suit in his own name. *Robertson v. Stewart*, 159
2. The purchaser of a *chose in action* for a valuable consideration will be protected in Equity.—*v. Arrington et al.* 164
3. A bare right of entry cannot be transferred. *Den on dem. of Slade v. Smith*, 248
Vide *Set-off*, 4.

CONDITION.

Vide *Variance*, 2.

CONFESSIONS.

Vide *Evidence*, 7, 21, 22, 25.

CONSIDERATION.

Vide *Money*, 4.

CONSIGNEE.

Vide *Factor*.

COSTS.

- 1 Upon *nulla bona* returned, the clerk may issue execution for the Plaintiff's

costs against the Plaintiff himself. *Merritt v. Merritt &c.* 20

2. The court cannot order the State to pay costs as a condition of getting a continuance: nor indeed, it seems, in any case. *State v.* 221
3. A surveyor and jury, who were appointed under separate orders in several distinct suits, shall be paid full costs in each suit, although from the locality of the lots sued for, the same labor answered for all the surveys.—*Wilcox v.* 223 & 484
4. An order that each party shall pay his own costs, means the costs accruing from the process issued for each, and not half the whole costs. The copy of the bill served on the defendant is for Plaintiff's benefit, and he must pay for it. *Anonymous*, 487
Vide *Witness*, 4. *Continuance*, 1, 2.—*Grants*, 9.

CONTINUANCE.

1. Where a cause had been depending three years in the County Court, and five years in the Superior Court, and the Plaintiff for the last three years had been uniformly ready for trial, the court ordered the Defendant to pay the costs of the Plaintiff's witnesses during the term as the condition of another continuance. *Den on dem. of Tyce v. Ledford*, 26
2. A party who has been guilty of neglect, may, upon seeking a continuance, be compelled to pay the costs of the term, as the condition of the continuance, and these costs are not to be refunded even though he should succeed in the cause. *Den on dem. of Park v. Cochran, et al* 178

CORPORATION.

Vide *Ejectment*, 6.

COVENANT TO STAND SEISED.

1. A deed, which is in form a bargain and sale except that the consideration is expressed to be love and affection, instead of money, may be construed a covenant to stand seized. *Den on dem. of Slade v. Smith*, 248

COVENANT, ACTION OF.

Vide *Debt, Action of*, 1, 2.

DEBT, ACTION OF.

1. Where there is no subscribing witness to a deed or bond, case and not covenant or debt is the proper action.—*Clements & Co. v. Eason & Wright*, 18.
 2. A bond for payment of money without a subscribing witness, can only be declared upon as a sealed instrument.—*Ingram v. Hall*, 193
- Vide *Money*, 7.

DECLARATION.

There is a difference between laying a fact after the time it really happened; and before the time it really happened; in the first case the declaration is supportable; in the second it is not.—*Quere* by *HAYWOOD*. *Witherspoon v. Isbell*, 12

DEED.

A, seised in fee of the premises in question, executed a deed to his son, in which he stated that for the preferment of his son, he conveyed the land to him and his heirs forever. Provided that this deed shall not take effect during the lives of the grantor and his wife, but the premises should remain first to him for his natural life and then to her for her life: held, that the last clause of the deed was a good reservation of the life estates, and that the fee is a good remainder upon them. *Den on dem of Sasser, &c. v. Blyth*, 259

Vide *Evidence* 1, 2, 6, 8, 9, 13, 20.—*Grant* 1.—*Covenant to stand seised*.

DELIVERY.

Vide *Gifts* 1—*Evidence* 9.

DEMAND.

Vide *Detinue* 1, 2, 3, 5.—*Limitations, Statute*, of 4.

DEMURRING OF THE PAROL.

The demurring of the parol does not hold in this State.—*Baker v. Long*, 1

DEPOSITIONS.

1. Notice to take a deposition at a certain place in Tennessee on the 5th or 6th days of a particular month, held good.—*Kennedy v. Alexander*, 25.
2. Depositions taken in the absence of a criminal shall not be read against him. *State v. Webb*, 103
3. A deposition not signed by the deponent may be read in evidence. *Murphy v. Work*, 105

4. It is usual to read depositions where it appears that they have been read in the court below, unless it can be shown that there is an irregularity in them, and the want of deponent's signature is not sufficient to reject them. *Rutherford v. Nelson*, 105
5. When a party moves away, without leaving an attorney upon whom a notice to take depositions may be served, such notice may be given in a public Gazette by an order of the court for that purpose. *Maxwell v. Holland*, 302
6. When either party has filed his depositions, he shall apply to the Master who shall issue notice to the other party to attend on a particular day, which shall be served a convenient time before the day appointed; upon which, the master is to examine all matters relative to the depositions, and his decision upon them shall be conclusive, unless objections to it are made at the time and an appeal to the Court taken. If these precautions are not observed, objections to the reading of depositions may be made at the hearing.—*Rule of the Court*, 349
7. A deposition certified to have been taken on the day and in the county in South-Carolina as specified in the notice, but without stating the particular place cannot be read. *English v. Camp*, 358
8. Notice to take a deposition at the house of John Archelaus Elmore, but the deposition certified to have been taken at the house of John Elmore:—held good, as they will be presumed to be the names of the same person. *Elmore v. Mills*, 359
9. It is the common practice to receive the depositions of those public officers (as the collectors of imports) the duties of whose office require their attendance at a particular place. *Mushrow & Co. v. Graham*, 361
10. A deposition expressed to have been taken at the house of Manning at Halifax, (Va.) Court-house, when the notice was to take it at Halifax Court-house, was rejected, although it was proved that Manning's house stood only about eighty yards from the court-house. *Alston v. Taylor*, 381
11. *Per WILLIAMS Judge*. A notice to take a deposition ought to be served upon the person of the other party. *HAYWOOD Judge*. Leaving the notice

at the residence of the adverse party is a sufficient service. *Kennedy & Co. v. Fairman*, 404

12. The notice was to take a deposition in Houser town, and the caption of the deposition expressed that it was taken in that town. The deposition was rejected. *Sur. Part. of M^r Naughton & Co. v. Lester*, 423

DEPRECIATED CURRENCY.

Vide *Money* 2, 5, 6, 7.

DETINUE.

1. Detinue will lie against one, of whom the negro had been demanded, although before the commencement of the action, the negro had been returned to the person of whom he had been hired. *Merritt v. Warmouth*, 12
2. Demand is necessary to sustain the action of detinue; and it must be made by the claimant himself, or by some one for him and so made known at the time of the demand. *Elwick's Executors v. Rush*, 28
3. On demand previous to bringing detinue, defendant acknowledged that the negroes were in his possession.—Proof that he had given one of the negroes to his son-in-law, who was in possession of him at the time of the demand, shall not prevent the defendant's liability to the action. *Flowers v. Glasgow*, 122
4. In detinue the jury should assess the value of different articles, separately. *Harwood's note to Lewis v. Williams*, 150
5. Demand, previous to bringing detinue is not necessary, or if so, only for the purpose of enabling the jury to decide upon the justice of allowing or disallowing damages for the detention. *Idem*, 150
6. The action of detinue will not lie against executors for the detainer of their testator. 398

DESCENT CAST.

Vide *Strudwick v. Shaw*, 5

DISCONTINUANCE.

Five defendants in trespass of which four are taken and plead to issue; if the process is not continued against the fifth for several terms, it will be a discontinuance as to all. *Cobbs v. Fowler*, 12

DOWER.

1. A widow since the act of 1784 can claim dower only out of the lands of which the husband died seised or possessed. *Winstead v. the Heirs &c. of Winstead*, 243
2. A levy upon lands in the life-time of the husband divests the widow's claim for dower upon those lands, tho' they may not be sold until after his death. The case was not decided, but *HAYWOOD* Judge was clear upon the points above. *WILLIAMS* Judge, differed at first, but afterwards seemed inclined to change his opinion. *Idem*, 243
Vide *Haywood's note to Lee v. Ashley*, 186

EJECTMENT.

1. In 1728 the land in dispute was granted to A. who in 1730, conveyed to B. who soon afterwards went to England. B. sold to C. who in came to this country but soon went back again.—In C. returned to Carolina where he remained and in 1787 brought suit. One D. settled on the lands in question in 1751; lived upon them thirteen years and died in possession, leaving a son. The son assigned to some person, who assigned to the defendant who had lately procured a grant. Under these circumstances it was held that the Plaintiff's *jus possessionis* was lost. *Strudwick v. Shaw*, 5
2. In ejectment, the word tenement with metes and bounds is sufficiently certain. *Den on dem. of Osborne v. Woodson*, 24
3. The defendant in an ejectment will not be allowed to defend only as to so much as the plaintiff can prove him in possession of. *Carter v. Branch*, 135
4. Articles for the conveyance of land, upon the payment of money, will not create such a trust on the part of the plaintiff (at least before the money is paid) as to prevent his recovering in ejectment from the person to whom the articles were made. *Anonymous*, 331
5. A claimant by escheat may enter and therefor may sustain ejectment. *University of N. Carolina v. Johnston*, 373
6. A corporation must make its leases under seal, but the lease which is stated in an ejectment by a corporation, is not to be proved, and will be presumed a legal one. *Idem*, 373
Vide *Exclusive or Inclusive*.—Amend-

ment, 2, 4, 6, 7.—*Grant*, 7, 8, 10.—*Abatement*, 5.

EMBLEMMENTS.

Baron of feme who had a life estate, is sued for use and occupation by the tenant in fee. The feme had died after the baron had prepared the land for cultivation but before planting, it was held that the Plaintiff was entitled to recover, but compensation must be allowed for the labor of the defendant in preparing it for cultivation. *See v. Young*, 17

ENTRY.

Rocks in a river above the surface of the water, are vacant property and the subjects of our entry laws. *Jones v. Jones*, 488
Vide *Execution* 1—*Possession* 4.

EQUITY.

1. A negro, whose life was forfeited to the public for murder, was sold under execution without that fact being then known. A bill in equity by the purchaser praying to stand in the place of the judgment creditors for the amount of the purchase money was sustained by the Court. *Conner v. Gwinn's Executors*, 121
2. After injunction dissolved, the plaintiff in the injunction must take further steps within two terms after, or his bill will be dismissed for want of prosecution. *Anonymous*, 162
3. Since the act of 1786, in case of complainant's death, the bill is continued in court two terms, in either of which terms, the legal representatives may apply and be made parties without a bill of revivor: and the application of a person not the legal representative, may be resisted, the same as if there were a bill of revivor. A person who may become interested otherwise than as legal representative, must state the circumstances by a bill for that purpose. *Idem*, 162
4. A person made a party defendant in a bill, who is not compellable to answer and against whom no relief is sought, may have the bill dismissed as to him. *Patterson & others v. Patterson & Sellars*, 167
5. When the court feels any doubt about deciding upon a plea; it can overrule it and suffer the defendant to insist upon the same in his answer. *Ingram v. Lanier*, 221

6. Where the law can give complete redress, equity will not interfere. *Glasgow v. Flowers*, 233
7. Equity cannot change established rules of law, nor act as a court of errors to correct erroneous decisions of law. *Idem*, 233
8. Where a matter is properly determinable at law, and the law can give complete redress, equity will not interfere. *Perkins v. Ballenger*, 367
9. Plaintiff has two terms after the dissolution of an injunction, in which he must take some steps, or his bill will be dismissed. *Avery v. Brance*, 369
10. The two terms within which the plaintiff must proceed after the dissolution of his injunction, are exclusive of the one in which the dissolution takes place. *Anonymous*, 451
Vide *Injunction*.

ESCAPE.

1. An action will not lie against the Sheriff for an escape upon *mesne* process. He ought to be proceeded against as bail under the act of 1777, ch. 2, sec. 16 and 76. *Swepton v. Whitaker*, 224
2. An action for an escape will not lie against an officer, who had made arrest when he had no authority to do so. *Lutterloh v. Powell*, 395
Vide *Sheriff* 14.

ESCHEAT.

Vide *Ejectment*, 5.

EVIDENCE.

1. Where a party has lost his deed, or is out of possession of it, he himself and no other person for him, must swear to such loss, before a copy can be received in evidence. *Blanton v. Miller*, 4
2. Proof of the acknowledgement of a deed is no proof of the sealing of it.—*Clements & Co. v. Eason & Wright*, 18
3. Proof of the handwriting of the wife of the obligor is not admissible. *Nehus v. Brickley's adm'rs*, 19
4. The mark of a subscribing witness, who is dead, may be proved to let in testimony of the obligor's hand-writing. *Idem*, 19
5. Upon proof that the subscribing witness could not be found upon search, his hand-writing was admitted to be proved and the bond given in evidence. *Jones v. Brinkley*, 20

6. If a deed be lost and its former existence proved, a copy, or if no copy, parole evidence may be given of its contents. *Den. dem. Baker v. Webb*, 43
 7. Confessions before a Justice of the Peace may be admitted in evidence although not reduced into writing.—*State v. Irwin*, 112
 8. Plaintiff may prove the loss of his deed by his own oath; but not that the plat offered in support of his title was part of the deed lost. *Seekright on dem. of Wright & Wife v. Bogan*, 176
 9. Proof of the obligor's hand-writing, where there is no subscribing witness, will be admitted as proof of the seal: but proof of the seal is not evidence of the delivery, which is to be inferred from other circumstances. *Ingram v. Hall*, 193
 10. The indisposition of a witness whose deposition had been taken *de bene esse* and was now offered to be read, cannot be proved by the oath of the party producing it, — *v. Brown's ex'rs.* 227
 11. When the subscribing witness to a bond is dead and his hand-writing cannot be proved, proof of the hand-writing of the obligor may be received. *Jones's adm'rs. v. Blount's ex'rs.* 238
 12. It seems that judicial proceedings speaking of an act of the Assembly, may be evidence of such act when it is lost by time. *Den on dem. of Slade v. Smith*, 249
 13. A copy of a registered deed, certified by the Clerk of the County Court in Virginia, who was certified by the Governor to be Clerk of that Court, is admissible. *Elmore v. Mills*, 359
 14. Acts of the General Assembly of Virginia must be certified by the Secretary and not by the Clerk of the House of Delegates, *Id.* 359
 15. Upon proof that a person of the name of the defendant executed the bond, the signature to the bond may be shown to be his hand-writing to prove the identity. *Mushrow & Co v. Graham*, 361
 16. When the wife acts as servant or agent of the husband, her admissions against his interest are admissible.—*Hughes adm'rs v. Stokes adm'rs.* 372
 17. The receipt of an attorney now deceased, is admissible to prove the time when bonds were put into his hands for collection. *Alston v. Taylor*, 381
 18. A record of Court testified properly, except a want of the seal of the Court, is not admissible unless it be certified that the Court had no seal.—*Id.* 381
 19. The declarations of the father that his conveyance to his child was fraudulent, are not admissible against the child. *Arnold v. Bell*, 396
 20. A copy of a deed cannot be read unless the plaintiff will swear that he has not the original, and that he cannot procure it. *Park v. Cochran and others*, 410
 21. A confession in an answer to a bill in equity, may be given in evidence against the defendant in an action by a third person. *Kiddie sur. part. of Ramsay & Kiddie v. Debrutz*, 420
 22. Naked confessions unattended with circumstances, are not sufficient to convict of a capital crime. *State v. Long*, 455
 23. Proof of the Clerk's hand writing in entries made in the plaintiff's books, shall not be admitted while the Clerk is living, although he may be absent from the country. *Kennedy & Co. v. Fairman*, 456
 24. In an indictment for horse-stealing, the jury may infer from circumstances, that the horse was taken by the prisoner in the district in which he is tried, although he was never seen with the horse in that district. *State v. Adams*, 463
 25. Confessions, whether extorted or not, that relate a number of circumstances, all of which are proved by other testimony actually to exist, are admissible against the prisoner. *State v. Moore*, 482
- Vide *Witness passim.*

EXCHANGE, COURSE OF.

Virginia money contracted for in this State, and payable here must be determined by legally established rates and not by the course of exchange.—*Montfort's ex'rs. v. Alston*, 2

EXCHANGE.

A person who has a chattel in possession belonging to another, and exchanges it for another article, acquires no property in the article taken in exchange, if the real owner thinks proper to approve of the transaction.—*Cox v. Jackson*, 234

EXCLUSIVE AND INCLUSIVE.

From the day of the date, and from the date, signify the same thing; and, according to the intent, are either inclusive or exclusive. *Houser v. Reynolds* 114

Vide *Appeal* 6, 8.

EXECUTION.

1. It is doubtful whether an entry can be sold by execution. *Reynold's v. Flinn*, 106
2. Execution upon a judgment after a year and a day, and after death of the defendant, without taking any *scire facias*, is irregular; and if in the County Court, may be avoided by writ of error; or if it was in the Superior Court by evidence in ejectment, if land was sold under it. *Perkins v. Ballenger*, 367
3. A debtor cannot dispose of his property to avoid an execution after it is issued. *Arnold v. Bell*, 396
4. Execution shall not issue during the term, at which the judgment was entered, although the defendant may be about to move away. *Pettiford v. Sanders*, 399

Vide *Lands—Judgment* 2.—*Fine* 1.

EXECUTORS.

Vide *Administrators and Executors* 6, 7, 8, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25.

EXTINGUISHMENT.

The giving of a note, is no extinguishment of the prior cause of action; and where there is a count upon a note, as well as the general counts, a recovery may be had upon the general counts although the note is alleged to be lost. *Kiddie sur part of Ramsay & Kiddie v. Debrutz*, 420

EXTORTION.

1. In an indictment for extortion in taking more than the legal fee, it is no excuse that the defendant did the act through mistake or under improper advice. *State v. Dickens*, 406
- Vide *Indictment* 4, 5.

FRAUDS & FRAUDULENT CONVEYANCES.

1. Fraud is not barely to be suggested, but must be proved. *Den. on dem. Bell v. Hill*, 72

2. The acts against conveyances to defraud purchasers, means conveyances by individuals, not grants from the State. *Reynolds v. Flinn*, 106
3. A disposition of any part of his property to a child by a father indebted more than he is worth, will be presumed fraudulent, unless the child can prove the purchase to have been made for a full and fair value actually paid. *Arnold v. Bell*, 396
4. Property sold remaining in the possession of the vendor, where there is an absolute bill of sale, is evidence of fraud; so is the not registering the bill of sale till long after it is made, coupled with an offer on the part of the vendor to antedate. *Hodges v. Blount*, 414
5. Where the possession of a chattel does not follow the conveyance, it is a strong circumstance to show fraud, though it may be explained or rebutted. *Cox v. Jackson*, 423

FACTOR.

A consignee was instructed to exchange the consigned produce for that of Surinam; when he arrived there, he found it impracticable to make the exchange for any thing but sugar and coffee, which were contraband by the law of that country; but still such kind of traffic was usual, and the law had not been enforced against it for many years. The consignee ventured to make the change for the contraband articles, but owing to an attempt to enforce the law, he had to resort to a subterfuge, in the doing of which some of the sugars were damaged; Held that he was not responsible for the loss. *Hagan v. Paine*, 272

Vide *Haywood's note to sur. part's. of M^r. Naughton & Co. v. Moore*, 190

FALSE JUDGMENT. WRIT OF.

1. A writ of false judgment differs from the assignment of errors: it is to be obtained upon affidavits and may be opposed by affidavits, on the other side. *Rhodes v. Brownlow*, 16
2. In a writ of false judgment, after a *sci. fa.* to the defendant to come in, &c. if the defendant does not appear, the judgment will be reversed without enquiring into the facts, if facts only are assigned, but if matters of law are assigned, the Court will look into them

to see whether it is proper or not to reverse the judgment. *Anonymous*, 398

5. A writ of *recordari* was moved for HAYWOOD Judge. A writ of false judgment is a writ of right, and we cannot deny it. It is like a writ of error, which the party may bring without leave of the court, STONE Judge.—The writ of false judgment and the writ of *recordari* are not the same.—When a *recordari* is moved for, we have power to refuse it. *Anonymous*, 469
- Vide *Haywood's note*,

FERRY.

- Per* HAYWOOD Judge. The County Court after establishing one ferry at a particular place, has no right to establish another so near the former as to draw away its profits. But *per* STONE Judge. The County Court is empowered to establish ferries where necessary, and may establish two at the same place, if it is deemed proper to do so. *Anonymous* 457

FINE.

1. When a defendant in Court is ordered in custody for a fine it will be improper to discharge him, and order a *fi. fa.* to issue for the fine. *State v. Johnson*, 293
2. The Court will not permit independent facts, for which the party would be liable to another prosecution to be given in evidence to enhance a fine. *Id.* 293

GIFT.

1. In a gift of personal chattels, a symbolical delivery is sufficient. *Arrington v. Arrington*, 1
2. If a father at the time of the daughter's marriage, puts a negro or other chattel into the possession of the son-in-law, it is *prima facie* a gift. *Farrel v. Perry* 2
3. Negroes sent with a daughter upon her marriage, or with a son-in-law and daughter, is *prima facie* evidence of a gift; and if the property remains any length of time with them, very strong proof will be required to show that only a loan and not a gift was intended. *Carter's ex'rs v. Rutland*, 97
4. The word creditors, in the act of 1784 ch.10, sec. 7, respecting parol gifts of slaves, means as well those who have

become creditor's since the parol transfer, as those who were such before.—

- Knight & Wife v. Thomas*, 289
5. A parol gift is good between the parties notwithstanding the act. *Id.* 289
 6. Where a father upon the marriage of his daughter, sends negroes or other property with her in marriage, it is *prima facie* a gift. *Parker & Wife v. Philips*, 451

GARNISHEE.

Vide *Certiorari* 1

GRANTS.

1. A grant from the State without the seal appendant offered in evidence.—Judge WILLIAMS thought that the deed was destroyed by the seal's being torn off; but Judge ASHE was clearly of opinion that where an interest once passed and vested in the grantee, the destruction of the deed could not affect the interest before passed by it.—*Steele v. Anthony*, 98
2. The act of 1777 ch. 1, sec. 9 voiding titles &c. means void as to the state which proceeds to avoid by *scire facias*. *Reynold's v. Flinn*, 106
3. Grants from the State, cannot be avoided for any cause, in any other manner than by proceedings in a court of Equity. *Sears v. Parker*, 126
4. It is the first patent or grant, and not the first entry in the land office, that gives the best title. *Seekright on dem of Wright & Wife v. Bogan*, 176
5. In the case of lapped patents, where both are in possession of their respective tracts, but neither actually settled on the lapped part, the oldest grantee will be considered as having the legal possession of that part.—*Id.* 176
6. When two patents or grants bear date on the same day, the number of the patents must determine their priority. *Den. on dem. Andrews v. Mulford*, 311.
7. In an ejectment, the first grant is the only thing to be inquired into, without any regard to the entry or survey. *Dickey v. Hoodenpile*, 358
8. HAYWOOD Judge, was of opinion, that a State grant of lands which had been granted by Lord Granville, and which had escheated to the State, was void as not being unappropriated lands and that this fact might be shown in the action of ejectment; but he re-

served the question. *University of North-Carolina v. Johnston*, 373

9. In a *caveat*, a verdict was found against the plaintiff, which was confirmed in the County Court, before which time however the plaintiff had obtained a grant from the State for the land, and now in the Superior Court, it was held that the grant could not be impeached at law, but as the defendant appeared to have had the justice of the case on his side, he shall have the costs of the *caveat*. *Cupples, Guardian of Allen v.* 456

10. State grants cannot be avoided by evidence in ejectment; recourse must be had to Equity for that purpose.—*Foreman v. Tyson*, 496

11. Where two patents bear the same date *HAYWOOD* Judge tho't the priority of number might decide the preference in the absence of the other proof, but *WILLIAMS* Judge *contra*. *Id.* 496
Vide *Frauds and Fraudulent conveyances*, 2

GUARDIAN.

Since the act of 1762, ch. 5, the Courts may exercise a discretionary power in the appointment of guardians. *Mills v. M'Allister*, 303

HUSBAND AND WIFE.

1. A note given to *feme covert* living separate belongs to the husband altho' he never assented to the gift. *Swann v. Gauge*, 3
2. Objected by counsel that the wife ought to be joined with the husband, where he is sued in her right as administrator. *Moore v. Suttrill's adm'rs*. 16
3. If the husband dies before administration taken upon his wife's *choses* in action, her administrator, and not his, is the proper person to administer them, but the husband's representation will be entitled to the surplus after the payment of her debts. *Whitbie's adm'rs. v. Frazier*, 275
4. Negroes are devised to wife for life, and after her death to their children equally; one of the daughters marries *L.* who dies leaving the mother and daughter living: the mother dies and then the daughter marries again. Held, that the executors of *L.* and not the second husband, are entitled to the negroes. *Quere* by *HAYWOOD*. *Lewis v. Hynes*, 278
Vide *Evidence* 3. 16. *Witness* 8.

HAND-WRITING.

Vide *Evidence* 3, 4, 5, 9, 11, 15, 23.—*Witness* 5.

HORSE-STEALING.

Vide *Larceny* 1. *Evidence* 24.

INDICTMENT.

1. In an indictment for burglary, a charge for larceny may be made, and a conviction for the larceny may be had, although the party be acquitted of the burglary. *State v. Graham* 12
2. An indictment for trespass in taking and carrying away negroes out of the possession of one, may be sustained, although it may have been done at the command of the party who had the real title to the property. *State v. White*, 13
3. Submission cannot be made upon one count without all, unless *not pros.* is entered as to the others. *State v. Roberts*, 176
4. An indictment for extortion in the County Court, stating the day on which the offence was committed in *figures*, and also omitting the word *extorsively* in charging the taking the unlawful fee may be supported under the act of 1784, ch. 31, sec. 3. *State v. Dickens*, 406
5. It is not necessary to state what the lawful fee is, in an indictment of this kind. *Id.* 406
Vide *Affidavit* 1. *Jurisdiction* 3

INFANCY.

A deed for land was executed by an infant; after arriving at full age, he used these words, "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land." These words ratify the conveyance made by the infant, notwithstanding that, after he used them, he conveyed the land to another. *Houser v. Reynolds*, 143

INJUNCTION.

A and B. settled accounts, and a balance of £47 was found due to B. and A. signed a writing to that effect, which B. assigned to a third person, who sued and recovered judgment.—A filed a bill for injunction, setting forth errors in calculation, and stating that by the agreement of the parties, the paper which he had signed was

not to be deemed a promissory note. The answer denied all the parts of the bill but the errors. **HAYWOOD** Judge, consented with **WILLIAMS** Judge, that the injunction should be dissolved as to all but the errors, but **HAYWOOD** said that it should be dissolved in *toto* for the law would have admitted every defence which could be made to the recovery on the instrument; as that it either was unnegotiable in its nature or the assignee had notice of the defence, previous to the assignment.— And if the assignee had not such notice, there could be no defence either at law or in equity where the instrument was negotiable.

Vide *Affidavit* 2. *Equity* 2, 9, 10.

INN-KEEPER.

A common inn-keeper is liable for any loss which his guest may sustain in his property, except it be by the agency of a servant or companion of the guest himself, or when the guest is admitted upon terms in case the inn is full.—
Quinton v. Courtney, 40

INSOLVENT DEBTOR.

1. Ten days notice must be given to the creditors before taking the insolvent debtor's oath. *Kennedy & Co. v. Fairman*, 408
 2. An insolvent debtor shall not be discharged if he will not account for property proved to have been in his possession shortly before, and sold to one who had acted as his partner in trade. *Note to the same case*, 408
 3. A discharge under the insolvent debtor's act, ordered by the proper officers, will be presumed to have been regularly done, until the contrary be shown. *Pearle v. Folsome*, 413
 4. Under the first insolvent act, the defendant was discharged only as to those who had commenced suits against him and had notice given them of the debtor's petition. *Id.* 413
- Vide *Bills of Exchange, &c.* 1.

INTAILS.

1. Tenant in tail in remainder, is entitled, under the act of 1784, to the fee. *Quere* by **HAYWOOD** *Patterson, v. Patterson & others*, 163
2. The act of 1784 ch. 22 sec. 5, will bar a remainder dependant upon an estate tail in possession of tenant in

tail at the time of passing the act —
Den. on the dem. of Lane v. Davis, 277

3. Tenant in tail sells lands in 1778, and dies leaving a larger estate of land to his son, the present plaintiff; he is bound by the warranty of his ancestor and assets descended. He is also bound by the express words of the act of 1784, ch. 22, sec. 5. *Minge v. Gilmour*, 279

INTEREST.

1. Whenever one person has the money of another and knows what sum he ought to pay, he must pay interest for the same. *State v. Blount & Blount*, 4
 2. Where a person indebted to another, knows what sum he is to pay, and the time he is to pay it, he must pay interest. *Hunt v. Jucks and London, sur. parts &c.* 173
 3. Interest is to be calculated upon the principal from the time of its commencement up to the first payment; if the payment just equals the interest, it must extinguish it; if it is more, it must after extinguishing the interest, be applied towards the diminution of the principal; if it is less, the balance of interest not discharged by it, must be kept for the next payment. Interest must then be calculated upon the principal remaining, to the time of the next payment, which is to be applied in the first place to the whole of the interest then due; and so *toties quoties*.
Bunn v. Moore's executor, 279
- Vide *administrators and executors* 5.

INVENTORY.

Vide *Administrators & Executors*, 24.

JOINT OBLIGORS.

1. Under the act of 1789, ch. 57, sec. 5, the first part of the section, the action is to be brought against both, the survivor and the administrator, of the deceased joint obligor. *Brown, Campbell & Co. v. Clary & Craig, adm'rs*. 107
 2. By the act of 1789 ch. 57, sec. 5, the surviving obligor and the executors of the deceased may be sued jointly —
Davis's executors v. Wilkinson & others, 334
 3. A writ issued against two jointly, and one plead in abatement; Plaintiff was suffered to take judgment against the other. *Quere* by **HAYWOOD**. *Anonymous* 487
- Vide *Abatement*, 1. *Process*.

JOINT OWNER.

Vide *Trover* 4.

JUDGMENT.

1. A judgment by default upon a tobacco bond is not final. *Den on dem. of Bell v. Hill*, 72
 2. A judgment (final) binds land from the time of its rendition, as to purchasers from the Defendant, but not so as to defeat the title of one purchasing under the execution of a subsequent judgment. As between creditors, it is not the first judgment but the first execution that gives the preference. *Id.* 72
 3. Recognizances bind lands from the time at which they are entered into; but a *fi. fa* only from its teste. *State v. Magniss*, 99
- Vide *Assumpsit Action of*, 1. *Appeal*, 4. *Assignment*, 2.

JURISDICTION.

1. A plea to the jurisdiction of the court under the act of 1793, c. 19, is to be decided, as to the amount for which the suit is brought, only by the writ and declaration. *Allen's executors v. Stokes*, 122
2. Indictment containing three counts, the first of which the court had no cognizance of. To submit on the first count, (the others not to be considered,) would oust the court of jurisdiction. *State v. Roberts*, 176

JURY AND JURORS.

1. After a verdict, in an indictment, it is too late to object that one of the jurors was not a freeholder in this State. *State v. Greenwood*, 141
2. If a jury, in a capital case separate without returning a verdict, the prisoner shall not be tried again for that offence. *State v. Garrigues*, 241
3. The act of 1779, *Rev. ch. 157, sec. 2*, respecting the appointment of jurors, is only directory, and does not apply to grand-jurors. *State v. Oldham*, 450

JUS POSSESSIONIS.

Vide *Ejectment* 1.

LANDS.

1. *Per MACAY*, Judge. The statute of 5th George II, c. 7, provides for the sale of lands for debts, and the making

them liable for all just debts in the hands of the heir, but does not alter the distinction between real and personal estate; real descends to the heirs, personal goes to executors; the lands in the hands of the heirs cannot be affected by a judgment against the executors, no more than the personal estate in the hands of the executors can be affected by a judgment against the heirs. But *per ASHE*, Judge: the statute meant to make lands liable to the payment of debts; and as to the payment of debts, are to be proceeded against as personal chattels: They descend to the heir chargeable with all such debts as may be recovered against the executor. *WILLIAMS*, Judge, on a previous case expressed an opinion similar to *MACAY*'S. *Den on dem. of Baker v. Webb*, 43

Vide *Scire facias*, 1.

LARCENY.

1. A horse stolen in one State or Territory and carried into another, will not make it a felony in the latter State. — *State v. Brown*, 100
 2. A special verdict which states the felonious taking in one State, and the taking continued into another, cannot be supported as a felonious taking in the latter. *Id.* 100
 3. *HAYWOOD* and *WILLIAMS*, Judges, were of opinion that the taking which is to constitute a felony, must be a trespass. *ASHE* and *MACAY*, Judges, thought a borrowing with a fraudulent intent, might be the ground of a felonious act. *State v. Long*, 154
- Vide *Indictment*, 1.

LEGACY.

A devise to the Plaintiff of cash sufficient in the opinion of the executors not exceeding £1000 to purchase a tract of land: in a following clause, the following devise, "I give to my wife all the negroes I obtained in marriage with her and their increase: also one third of stock, &c. and the residue I give to my children by my present wife." The estate is exhausted except the negroes contained in the residuary clause to the wife and children, and debts to a large amount remain unpaid: Plaintiff claims his thousand pounds. Decided, that the Plaintiff

tiff's legacy is general, but still entitled to be paid out of the residuary part devised to the wife and children, which, as a residuum, can never be specific: that the children's part is to be first applied, as the wife's part, tho' general and residuary as to the Plaintiff, is specific in reference to theirs: that as the testator in mentioning the sum of £1000 for the plaintiff, contemplated a full enjoyment by the legatees of their respective legacies of slaves: therefore, under the discretionary power given to the executors of fixing the amount to be paid to the Plaintiff, his legacy shall be abated from £1000 in proportion to the value of the negroes that shall be required to pay the debts. *Nash v. Nash's adm'r's.* 228

Vide *Account*, 1.

LIEN.

A boat is drifted away from a landing, and taken up by a stranger, who sells to defendant: held, that the stranger's right to salvage, is a demand upon the plaintiff, to be enforced by detention, and that the right is not transferable to a purchaser of the property. *Winslow v. Walker*, 193

LIBERUM TENEMENTUM, PLEA OF.

Vide *HAYWOOD's* note to *Lee v. Ashley*, page 186.

LICENCE.

Vide *Nuisance*, 3.

LIMITATIONS, STATUTE OF.

1. *Per WILLIAMS*, Judge. An acknowledgement made to an executor will prevent the operation of the statute of limitations, as well as if made to the testator. But *ASH*, Judge, *contra*.—*Billews, Adm'r. v. Bogan*, 13
2. The act of limitations will not run, but from the time that it is known where the chattels, and that it is adversely claimed. *Berry's Adm'r's. v. Pullam*, 16
3. Acknowledging that a debt is not paid, is not an acknowledgment of the debt, so as to prevent the effect of the statute of limitations. *Ferguson & Wife v. Taylor*, 20
4. Said by the Judge, *arguendo*, that the statute of limitations runs from the time the Plaintiff knew where the ne-

groes were, and that the Defendant claimed them, although no demand had been made. *Elwick's ex'rs. v. Rush*, 28

5. The statute of limitations runs from the date of the last article in an account, where the account has been running on from its commencement; but where it is once deserted or ended between the parties, then from that time. *Sur. Part'rs. of McNaughton & Co. v. Norris, &c.* 216
6. These words in a letter from a Defendant to the plaintiff, "I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a law suit," are sufficient to take the case out of the statute of limitations. *Ferguson v. Fitt*, 239
7. The words of a will, directing all just debts to be paid, will prevent the bar of the statute of limitations. *Anonymous*, 243
8. When the act of limitations once begins to run, none of the impediments mentioned in the act will stop its course. *Den on dem. of Andrews v. Mulford*, 311
9. The statute of limitations begins to run from the time the negroes came into the possession of the Defendant, unless entrusted with them by the Plaintiff for an indefinite time, (for then the act will not begin to run till demand made) or unless the Defendant removed himself so that the Plaintiff could not find him to bring suit, or had the negroes without the knowledge of the Plaintiff. *Elmore v. Mills*, 359
10. When the act of limitations begins to run against a *feme sole*, her marrying will not suspend its operation. *Anonymous*, 416
11. No person can plead the statute of limitations except the defendant, as for instance, a garnishee cannot.—*Anonymous*, 459
12. The statute of limitations will run against the Plaintiff, although the Defendant may be out of the country.—*Id.* 459

Vide *Possession*, 1, 2, 3, 4.

LIMITATION OF ESTATES.

Vide *Slaves*, 1. *Deed*.

MAIMING.

1. Malice aforethought is express, or to be implied from circumstances: intent to maim or disfigure, may likewise be implied from circumstances: and it is not necessary to prove antecedent grudges, threatenings or an express design. *State v. Irwin*, 112
2. When an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind, which the law requires to constitute guilt, until the contrary is shewn.—*State v. Evans*, 281

MASTER.

1. The master does not lose his wages by the loss of the vessel. *Ferguson v. Pitt*, 239
2. Making a man master, and giving him command of a ship is *ipso facto*, giving him power to take a load for freight in a foreign port; and his contract, in such case, binds the owner. *Murfree v. Redding*, 276

MONEY.

1. The possession of money gives the property of it, as to any disposition which the possessor may make of it. *Quinton v. Courtney*, 40
2. Bond for payment of £100 Virginia money, to be paid in Proc. at 33 $\frac{1}{3}$ per cent. Jury gave a verdict for the equivalent in the present currency. But *Per Curiam*—the verdict should be for £133 6 8. But upon a second trial, the same verdict being given, the counsel did not press it any farther. *Peete's ex'rs. v. Webb's adm'r's*. 96
3. Whoever has the possession of money, has the property of it. *Clary v. Allison*, 111
4. Money deposited by one person to be paid to another upon a contingency cannot be recovered by that other, but must be sued for by the person who makes the deposit. *Id.* 111
5. Payments made in the depreciated currency prior to 1783, shall discharge the same numerical sum as their nominal value. *Anonymous*, 183
6. In an action of covenant for a certain sum in Silver or Spanish milled dollars, the jury are at liberty to give the real value in our currency as damages, notwithstanding the act of 1783, c. 4, s. 2. *Winslow v. Bloom*, 217

7. In an action of debt two things are recoverable, the numerical sum mentioned in the bond, and damages for the detention of the debt; and these damages are generally the interest of the money mentioned in the bond; but if the currency of the country is depreciated, the jury may give such damages as will afford the Plaintiff the real value of his debt & interest thereon. *Anonymous*, 354
- Vide *Exchange, course of*.

MORTGAGE.

After a conditional decree of foreclosure, but before absolute decree entered, a person, who has acquired an interest in the property mortgaged, may be allowed to come in and file a bill, in order to get the benefit of redemption. *Anonymous*, 482

MURDER.

1. A motion to postpone a trial for murder on account of the great public excitement, was refused. *State v. Norris*, 429
2. WILLIAMS and HAYWOOD, Judges, differed as to the question, whether a juror could be asked on oath whether he had expressed an opinion unfavorably to the prisoner. *Id.* 429
3. A person who was violently abused and beaten, made his escape, ran to his own house eighty yards off, got a knife, ran back, and upon meeting with the deceased, stabbed him. It seems that he is only guilty of manslaughter. If, upon the second meeting, the prisoner had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, the killing would have been murder. *Id.* 429

NEW TRIAL.

1. Verdict against evidence is not sufficient for a new trial, if justice is done by it. *Billows, Adm'r. v. Bogan*, 13
 2. If it appears, upon another trial of the same cause in which the perjury is assigned to have been committed, that the person convicted did not swear falsely in the first trial of the cause, a new trial will be granted him upon that ground. *State v. Greenwood*, 141
- Vide *Arbitrament and Award*, 4.

NONSUIT.

HAYWOOD, Judge, a nonsuit may be taken at any time before the verdict is recorded. But the case went off upon another ground. *McNaughton's ex'rs. v. Mosely*, 331

NUISANCE.

1. An action for a nuisance will lie for every fresh continuance after a former action. — *v. Deberry*, 248
2. Only nominal damages are, usually, given in the first action. *Id.* 248
3. A verbal licence by which a man's land is to be affected is not good. — *Id.* 248
4. The action on the case for a nuisance, lies for any overflowing of the Plaintiff's land by another. *Carruthers v. Tillman*, 501
5. In this action, the first suit is generally to try the question of nuisance or not, and only the real damages sustained are to be given; but if a second suit be necessary on account of the continuance of the nuisance, exemplary damages are given to compel its abatement. *Id.* 501

ORPHANS' BONDS.

1. Under the act of 1762 *ch. 5, sec. 20*, which directs the bonds taken on binding out orphans, to be made with the chairman of the court and his successors, the bond is good although the successor be not named; and a suit may be sustained in the name of the successor. *Anonymous*, 144
2. After the plea of conditions performed, no advantage can be taken of any inconsistency in the indentures of apprenticeship, as where, in a part of the instrument, the name of the apprentice is put for that of the chairman. — *Id.* 144

PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENTS.

Vide Assignment, 1. Boundary, 14789.

PAYMENT. PLEA OF

An account against the Plaintiff cannot be given in evidence under the plea of payment. *Evans v. Norris's administrators*, 411

PERJURY.

Vide new trial, 2. Variance, 3.

PLENE ADMINISTRAVIT, PLEA OF.
Vide Administrators & Executors, 1420
25. Retainer.

PARTIES.

Where a person concerned in interest, is stated in the bill to be moved away and not since heard of for many years, so that he cannot be served with process, that shall be a good reason as between third persons, for not making him a party; and the court will proceed to a hearing notwithstanding. — *Ingram v. Lanier*, 221
Vide Money, 4. Equity, 4. Husband & Wife, 2. Scire facias, 2.

PARTITION.

Vide Partnership, 3.

PARTNERSHIP.

1. General reputation is not sufficient to charge a particular person as a partner. There must be some confession of his or some overt act to prove it. — *Hunt v. Jucks & London, Sur. Parts. &c.* 173
2. *Per HAYWOOD*, Judge. Death of one partner dissolves the partnership, and a clerk or agent who has been appointed by the company, cannot, after such dissolution, do any act to affect the interest of the company, as to receive payments &c. The jury found otherwise. *Vide Haywood's note, Sur'ng. Parts. of McNaughton & Co. v. Moore*, 189
3. A partition, in a partnership concern is matter of right, and may be called for at any time. *Collins v. Dickanson & Allen*, 240
4. An assignor and assignee are both members of a particular company: a bill is made payable to the assignor, expressed to be for a debt due the firm: a payment to the company will be a good payment against either the assignor or assignee members of that company. *Black v. Bird*, 273
Vide Set-off, 3.

POSSESSION.

1. In this country no actual entry is necessary until an adverse possession commences. *Den on dem. of Park v. Cochran*, 178
2. A possession to bar an entry must be a continued one. *Id.* 178

3. An actual possession is not necessary to prevent the operation of the statute of limitations until an adverse possession commences, which adverse possession must be a continued one for seven years to bar the Plaintiff. *Den on dem of Slade v. Smith*, 248
 4. No possession, except an actual one by the claimant himself or his tenant, commenced *bona fide* under a patent or grant, adverse and continued for seven years, will give title under the act of limitations. *Den on dem. of Andrews v. Mulford*, 311
 5. The caveator was settled upon a tract of unappropriated land for many years and supposed the land in dispute to be included within his boundaries, when in fact it was not. The possession is stated to have been upwards of twenty one years. It was decided that the caveator was not entitled by the entry laws of 1777, c. 1, s. 16, and 1779, c. 7, s. 2, as not having claimed within the time limited by the acts—nor by the statute of limitations, 1715, c. 27, s. 3, which applies only to claimants under patents—nor yet by the act of 1791, c. 15, limiting the claims of the State, as that act is bottomed upon the presumption of a former grant, and is not applicable to vacant lands. *Anonymous*, 466
- Vide *Money*, 1, 3. *Grants*, 5.

PRINCIPAL AND ACCESSORY.

Command, as applied to principal and accessory, means the ordering a thing to be done, by a person who has the legal control over another, as a master over his servant. *State v. Mann*, 4

PROCESS.

If, in an action against two Defendants for a joint contract, one cannot be taken, after the *pluries writ*, the other may be proceeded against alone—*Sherrod v. Davis*, 282

Vide *Discontinuance*. *Administrators & Executors*. 3. *Sheriff*, 6, 13.

PUIS DARREIN CONTINUANCE, PLEA OF.

1. A plea *puis darrein continuance*, is a waiver of all former pleas, and an admission of the declaration. *Greer v. Shepperd*, 96

2. The court must be satisfied of the probable truth of the plea. *puis darrein continuance*, before they will permit it to be pleaded. *Sur. Partners of McNaughton & Co. v. Naylor*, 180
3. At the pleading term, certain pleas were put in : at another term afterwards, another plea was added, but not expressed to be a plea *puis darrein continuance*: The court will not take the last plea to be *puis darrein continuance*. *Peale v. Folsom*, 181

QUI TAM ACTION.

Vide *Abatement*, 6.

RACING.

The rules of racing are to be consulted in deciding upon racing contracts. *McKenzie v. Ashe*, 502

RECEIVERS OF PUBLIC MONEY, SUMMARY JUDGMENT AGAINST.

The act of 1793, authorizing the Attorney General to take judgments against the receivers of public money, by motion, and that their delinquencies should be sufficient notice to them, was declared to be unconstitutional and void by WILLIAMS, Judge, but was afterwards allowed by MACAY and ASHE, Judges. *State v. —*, 28

RECOGNIZANCES.

Vide *Judgment*, 3.

RECORD.

1. A copy of a record should be *verbatim*, and not be certified by the clerk that such things appeared to him from the record. *Wilcox v. Ray*, 410
2. The loss of a record must be proved by the oath of some person, and not by the certificate of the clerk. *Id.* 410

RECORDARI.

Vide *False Judgment*, writ of.

REHEARING, PETITION FOR.

Vide *Review*, Bill of.

RETAINER.

A retainer may be either pleaded, or given in evidence under the plea of *plene administravit*. *Evans v. Norris's adm'rs*, 411

Vide *Administrators & Executors*, 18.

REVIEW, BILL OF.

An injunction against a judgment at law had been dissolved, and upon the coming out of the execution, the Defendants at law exhibited their bill praying a reconsideration of the sentence of dissolution, and an injunction, in the mean time, against the execution. This injunction was granted by a Judge in vacation and the bill was filed and answer put in. This is not a bill of review, but the court will support it as a petition for rehearing. *Kennon's Ex'rs. v. Williamson et al.* 350

REVIVOR, BILL OF.

Vide *Equity*, 3.

SALVAGE.

Vide *Lien*.

SCIRE FACIAS.

1. Where there is judgment and execution against the ancestor in his lifetime, no *scire facias* is necessary ag'nst the heirs or devisees. *Baker v. Long*, 1
2. Where the defendant dies, his representatives must be made parties by *scire facias*; but when the plaintiff dies his representatives have two terms under the acts of 1786, c. 14, and 1789, c. 57, sec. 7, to come in and be made parties without any process. *Anonymous*, 455

SEQUESTRATION.

Vide *Alimony*, 1, 2.

SET-OFF.

1. A set-off against the State was allowed in the case of the *State v. Tulom* cited in *State v. —* 221
2. Unliquidated damages cannot be set off; but when they are reduced in *rem judicatam* they may be. *Hogg's Ex'rs. v. Ashe*, 471
3. In an action brought by two partners a debt due from one of them cannot be set-off; but if one of the partners dies, then in a suit by the survivor, a debt due from him may be set-off.— *Id.* 471
4. When a chose in action is assigned for value received, no debt contracted subsequently shall be allowed even at law, as a set-off against the assignee, especially if there be an act of the Le-

gislature taking notice of the assignment and enabling the assignee to sue in his own name. *Id.* 471

SHERIFF.

1. A Sheriff cannot legally purchase property at his own sale, and is punishable for so doing. *Anonymous*, 2
2. Sale of land by Sheriff where there is sufficient personal property is good as to the purchaser. *Den on dem. of Osborne v. Woodson*, 24
3. The want of forty days advertisement, or the land's not being sold until a day or two after the day appointed will not vitiate the sale. *Id.* 24
4. Dictum by the court if the Sheriff sells real, when there is sufficient personal property, he will be liable to an action by the party grieved, unless the party does not show personal property sufficient to satisfy the execution.— *Id.* 24
5. One bidder at a Sheriff's sale is sufficient, and a return of "no sale for want of bidders," in such case, will subject the Sheriff to an indictment for a false return. *State v. Joyce*, 43
6. Process returned by the Deputy Sheriff, should be in the name of the High Sheriff, and not in the name of the Deputy for the High Sheriff, but a return in the latter mode was supported. *McMurphey v. Campbell*, 181
7. Judgment upon a Sheriff's bond is to be entered for the real amount recovered, not for the penalty to be discharged by the payment of the real recovery. *Adm'rs. of Hostler v. Patterson & others*, 216
8. One bidder at a Sheriff's sale is sufficient: but the bidder must be one who is able to advance the money which he offers as his bid. *State v. Johnston*, 293
9. A return in the name of the High Sheriff by his deputy, if false, will render the Sheriff liable *criminaliter*. *Id.* 293
10. A Sheriff who levies upon property is bound to sell it although the term of his office be expired. *Anonymous*, 415
11. A Sheriff must sell, although no *venditioni exponas* issue. *Id.* 415
12. The court will issue a writ of *dis. tringas* to the new Sheriff to compel the late Sheriff to raise the money, and

deliver it to the new Sheriff to be brought into court. *Id.* 415

13. A recovery in ejectment was had against the Sheriff of a county & there was no coroner; the writ of possession may issue to the Sheriff of an adjoining county under the act of 1779, c. 5, s. 3. *Anonymous,* 422

14. If the Sheriff returns an escape to a *capias ad respondendum*, he may be sued for the escape, & not be proceeded against as bail. *Tuton v. the Sheriff of Wake,* 485

15. A purchaser of lands under a Sheriff's sale cannot sustain an action for money had & received against the Sheriff, upon the ground that the title was bad & the consideration had therefore failed. *Bright v. White,* 492

Vide Escape, 1.

SHERIFF'S SALE.

Vide Sheriff, 1, 2, 3, 4, 5, 8, 15.

SLANDER.

Words, in an action of Slander, bear that signification which they have in common parlance: therefore, to say one has sworn false in court, implies malice, and also, in this country, must mean such a court as has power to administer an oath, and it is therefore actionable. *Hamilton v. Dent,* 116

SLAVES.

1. Where slaves are given to one for life, remainder over, the increase born during the life interest, will go with the principal to the remainder man. *Tins v. Potter* cited in *Glasgow v. Flowers,* 233
 2. The action of trespass and false imprisonment is the usual and proper remedy for one who is held in bondage to try his right of freedom. *Evans v. Kennedy,* 422
 3. Where the Plaintiff in an action of this kind is not ready, and obtains a continuance, the defendant must give bond and sureties for the plaintiff's appearance at the next term, and in the mean time to treat him with humanity. And by HAYWOOD, Judge, also to allow plaintiff time to procure evidence, but WILLIAMS, Judge, was of a different opinion. *Id.* 422
- Vide Gifts, 4, 5.*

SPECIAL PROPERTY.

Vide Trover, 3.

SUCCESSOR.

Vide Orphans' Bonds, 1.

SURRENDER.

Vide Bail, 2, 3, 4.

SURVEYOR.

Vide Costs, 3.

TENDER.

1. In this case the jury could not agree upon the evidence, and a juror was withdrawn: but it seemed to be agreed by all the bar and Judge MACAY, that if the jury had found for the defendant on his plea of "tender and refusal at the day and place" where he was bound by a sealed writing to deliver a certain parcel of cattle, that the plaintiff would have been forever barred of any recovery on the covenant. Questioned by HAYWOOD. *Mchaffy v. Spears,* 142
2. A tender of a specific article (as a negro boy) where no particular place is appointed for delivery is not sufficient if only made at the house of the person who is bound to make it. *England v. Witherspoon,* 361

TROVER.

1. Trover, trespass, deceit or any other action of the like nature will lie against executors for a conversion by the testator, where the thing goes to increase the estate, but not where it is only destroyed. *McKinnie's Ex'rs. v. Oliphant's Ex'rs.* 4
2. Trover will lie against executors for a conversion in the time of their testator. *Decrow v. Mone's Ex'rs.* 21
3. A, and B, both have bills of sale for a horse from a person who had borrowed him for a particular purpose; A, whose bill of sale is the oldest, has him in possession; B, by some means gets him from A and sells him to C.—A, is entitled to recover him of C, in the action of trover. *Hughes v. Giles,* 26
4. If one of two joint owners of a vessel forcibly take possession of her, and send her to sea, without or against the will of the other, and she is lost, he will be liable in trover for her. *Lowthorp v. Smith,* 255

5. The action of trover may be supported against executors for a conversion in the lifetime of their testator.—*Clark v. Hill*, 308
6. The action of trover will lie against executors, for a conversion in the lifetime of their testator, although the estate may not have been benefited by such conversion. *Avery v. Moore's Executors*, 362

TRESPASS.

Vide *Indictment*, 2. *Larceny*, 3. *Slaves*, 2. *Abatement*, 4.

TRUST.

Vide *Ejectment*, 4.

USURY.

Defendant had been awarded to pay to plaintiff a certain sum, but at the day of payment, not having the money, he agreed with plaintiff to give more than six per cent for indulgence; and a bond was given for the principal sum, and the amount above the legal interest was paid partly in money, and a note given for the balance. Upon an action on the bond, it was held that the transaction was usurious and the bond void. *Glisson v. Newton's Exr's*. 336

USE AND OCCUPATION.

Vide *Assumpsit*, action of, 2

UNCONSTITUTIONAL ACTS.

Vide *Receivers of the Public Money*.

VARIANCE.

1. After verdict it is too late to take advantage of a variance between the writ and declaration. *HAYWOOD's note to Lewis v. Williams*, 150
2. The condition is no part of the obligation, and a bond with a condition would not support a declaration for the sum mentioned in the condition. *Adams v. Spear*, 215
3. The words assigned in an indictment for perjury were, that "*Gatling* did not interrupt the constable in driving the cattle to *Gatling's* house," and the words proved were, that "*Gatling* did not assist in driving the cattle from the officer." It was held, that the words charged and those proved must be clearly and evidently of the same meaning, without the help of any im-

plication or any thing extrinsic; and that in this case the variance was fatal.

State v. Bradley, 403 & 463

4. The declaration stated an undertaking by two with a third, to run a race with him and to pay him if he won—the evidence was, of a race made between one of the two and the third, for performance whereof, the other of the two became his surety on the day of the race. It is a fatal variance.—*Anonymous*, 488

Vide *Orphans' Bonds*, 2.

VERDICT.

1. No point can be raised in a special verdict except what appears upon the record. *Anonymous*, 459
2. A verdict finding among other things, an issue not submitted to the jury, is void as to such finding. *Anony.* 144

Vide *Larceny*, 2. *Jury and Jurors*, 1, 2.

WARRANT.

A warrant of a Justice which does not appoint a day and place within the thirty days for the defendant to appear, is erroneous. *Anonymous*, 398

Vide *Arrest*, 1, 2, 5.

WARRANTY.

1. *Caveat emptor* applies, where a man purchases personal property not in the possession of the vendor. It also applies where there is a visible defect in the thing sold; and in each of these cases no implied warranty will be raised. *Galbraith v. White*, 464
2. If a man sell an unsound horse whose disorder is not known, and receives full value, the sound price implies an assumpsit that the horse is sound.—*Id.* 464

WITNESS.

1. Interest in the event of the question, but not of the cause, will not exclude a witness. *Farrel v. Perry*, 2
2. A person entitled to a reward offered by the General Assembly, upon the conviction of an offender, is a competent witness against such offender.—*State v. Coulter*, 3
3. Interest in the event of the question, will exclude a witness. *Madox v. Hoskins*, 4
4. Motion to prevent the taxing the Defendant with the costs of two wit-

- nesses who were not sworn, as only one fact was to be established and two other witnesses had been called upon for that purpose: Motion denied, as the defendant had summoned a witness who was absent and they might have been introduced to counteract his testimony. *Hayle v. Cowan*, 21
5. MACAY, Judge, inclined to think that the handwriting of a subscribing witness who had voluntarily become interested in the bond, could not be proved; but the case was adjourned.—*Hamilton v. Williams*, 139
6. The interest to exclude a witness to a will must be either an express legacy directly to him, a legacy with an express use for him, or a secret trust and agreement on the part of the legatee for his use; and a declaration by witness that legatee holds for his use, will not exclude, unless it be proved that the legatee had made an engagement to hold for his benefit. *Rogers v. Briley*, 256
7. Though a fact be positively sworn to by one or two witnesses, and they agree pretty well in their testimony, yet the jury, either from their character, or the circumstances of the case, may disbelieve them and find against their evidence. *Id.* 256
8. The wife of a person interested in the event of the question, but not of the cause is admissible as a witness—*Porter v. McClure*, 360
9. The State may discredit its own witness by proving that the witness on former occasions had given a different account of the transaction from that which he relates in court. *State v. Norris*, 429
- Vide Evidence.

ERRATA.

Page. Line.

- | | | |
|-----|-----------|---|
| 1 | *4 | of the note strike out the words, "if gift." |
| 5 | | last of the abstract to the case of <i>Greenlee v. Young</i> , for "consideration" read "condition" |
| 81 | 10 | from the bottom, for "could be sold," r. "could not be sold." |
| 85 | 1 | of the note, for "act of 1714," r. "act of 1784." |
| 87 | 16 | from the bottom, for "now" r. "not." |
| 111 | 24 | of the note, for "binds lands from its <i>teste</i> ," r. "binds lands from its levy." |
| 130 | 10 | from the top, for "directed" r. "decided." |
| 135 | 1 | for "establishing" r. "abolishing" |
| 145 | 1 | of the abstract to the case of <i>Sears v. Parker</i> , for "cases" r. "causes." |
| 162 | 11 | from the bottom, for "court" r. "count." |
| 172 | 3 | from the top, for "warrant" r. "covenant." |
| 174 | 32 | from the top, for "buy" r. "levy." |
| 175 | 1 | in the words "without what value," strike out "without." |
| 217 | 21 | from the bottom, for " <i>McAuslin's</i> " r. " <i>McNaughton's</i> ." |
| 229 | 5 | from the bottom, for "much less general" r. "much more general." |
| 246 | 2 | from the top, insert "is" between "condition" and "no part." |
| 269 | 3 | from the bottom, for "action" r. "reason." |
| 456 | 20 | from the bottom, for "April Term, 1794," r. "April Term, 1795." |
| 592 | number 18 | of the title <i>Evidence in the Index</i> , for "testified" r. "certified." |
| 595 | number 3 | of the title <i>Husband & Wife, in the Index</i> , for "representation" r. "representatives." |

* In the table of the cases reported, the notes and the index, reference is made to the pages of the first edition; but in the foregoing list of *Errata*, the pages of the present edition are referred to.

